

**APPENDIX A — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
FILED DECEMBER 31, 2008**

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 04-55732

D.C. No. CV-00-01726-NAJ/AJB

MITCHELL BARNES-WALLACE;
MAXWELL BREEN,

Plaintiffs-Appellees,

v.

CITY OF SAN DIEGO,

Defendant,

and

BOY SCOUTS OF AMERICA -
DESERT PACIFIC COUNCIL,

Defendant-Appellant.

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No. 04-56167

D.C. No. CV-00-01726-NAJ/AJB

MITCHELL BARNES-WALLACE; MAXWELL BREEN; LORI BARNES-WALLACE, Guardian Ad Litem; LYNN BARNES-WALLACE, Guardian Ad Litem; MICHAEL BREEN, Guardian Ad Litem; VALERIE BREEN, Guardian Ad Litem,

Plaintiffs-Appellants,

v.

CITY OF SAN DIEGO; BOY SCOUTS OF AMERICA - DESERT PACIFIC COUNCIL,

Defendants-Appellees.

ORDER

Filed December 31, 2008

Before: William C. Canby, Jr., Andrew J. Kleinfeld,
and Marsha S. Berzon, Circuit Judges.

Order;
Dissent by Judge O'Scannlain

ORDER

Judge Berzon has voted to deny the petition for en banc rehearing of the Certification Order filed June 11, 2008, and Judge Canby has so recommended. Judge Kleinfeld has voted to grant en banc rehearing.

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The petition for en banc rehearing has been circulated to the full court. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed R. App. P. 35. Judges Gould, Tallman, Clifton and N.R. Smith were recused.

The petition for rehearing en banc is denied. The Clerk of this Court is instructed to transmit the Order Certifying Questions, filed June 11, 2008, to the Supreme Court of California as directed under Section V of that Order. The earlier order of December 18, 2006, certifying questions to the California Supreme Court was withdrawn by this court on June 11, 2008.

This case shall continue to be withdrawn from submission until further order of this Court.

O'SCANNLLAIN, Circuit Judge, dissenting from the denial of rehearing en banc, joined by KLEINFELD, BYBEE, CALLAHAN, BEA, and IKUTA, Circuit Judges:

Today, our court promulgates an astonishing new rule of law for the nine Western States. Henceforth, a plaintiff who claims to feel offended by the mere thought of associating with people who hold different views has suffered a legally cognizable injury-in-fact. No other circuit has embraced this remarkable innovation, which contradicts nearly three decades of the Supreme Court's

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standing jurisprudence. In practical effect, the three-judge panel majority's unprecedented theory creates a new legal landscape in which almost anyone who is almost offended by almost anything has standing to air his or her displeasure in court. I must respectfully, but vigorously, dissent from our failure to rehear this case en banc.

I

For nominal rent, the City of San Diego leases portions of two public parks to the Desert Pacific Council, which is a "nonprofit corporation chartered by the Boy Scouts of America." *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 779 (9th Cir. 2008). The Boy Scouts operate Camp Balboa in Balboa Park, which "includes campgrounds, a swimming pool, an amphitheater, a program lodge, a picnic area, a ham radio room, restrooms and showers, and a camp ranger office." *Id.* at 781. The Boy Scouts also operate a Youth Aquatic Center on Fiesta Island, which "offers the use of kayaks, canoes, sail and row boats, and classroom space to other youth groups at inexpensive rates." *Id.* Importantly, "[t]here are no religious symbols either at Camp Balboa or at the Youth Aquatic Center." *Id.* at 782.

For limited times, the Boy Scouts use the leased areas for their own events, but otherwise keep the areas open to the general public. Although the Boy Scouts' membership policies exclude homosexuals and agnostics, the Boy Scouts do not discriminate on the basis of sexual

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orientation or religion in administering the leased parklands.¹ A homosexual or an agnostic may use the lands leased to the Boy Scouts on the same terms as everybody else. Indeed, “[t]he San Diego Boy Scouts have not turned away any non-Scout group while Scouting is in session, either at Camp Balboa or at the Aquatic Center.” *Id.* at 782.

Nevertheless, a lesbian couple with a son and an agnostic couple with a daughter challenged the leases under the religion clauses of the United States and California Constitutions. The families did not have any of the traditional bases of standing: they did not compete for the leases, try to participate in any Boy Scout activities on the leased land, or even use or try to use the land for their own purposes (although they did use the portions of the parks that the Boy Scouts did not use). Rather, the families based standing on the claim that although they wanted to use the public land and *could* use it without interference from the Boy Scouts, they nevertheless declined to use it, because they *would be* offended by the Boy Scouts’ views on sexuality and religion if they did.

The majority initially rejected the families’ psychological injury claim, holding:

The Breens’ and the Barnes-Wallaces’ purposeful avoidance of the parklands leased

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1. Indeed, as the plaintiffs’ own complaint concedes, the leases themselves, in conjunction with the Municipal Code of San Diego, prohibit discrimination on the basis of religion or sexual orientation.

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by the Boy Scouts as a protest against the Scouts' exclusionary policies is not a sufficient injury. We have held that people can suffer a direct injury from the need to avoid large religious displays, such as giant crosses or lifesize biblical scenes But there are no displays in either Camp Balboa or the Aquatic Center that would be so overwhelmingly offensive that families who do not share the Scouts' religious views must avoid them. See *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485, 102 S. Ct. 752, 70 L.Ed.2d 700 (1982) (requiring the plaintiffs to show a personal injury suffered 'as a consequence of the alleged constitutional error') (emphasis omitted).

Barnes-Wallace v. City of San Diego, 471 F.3d 1038, 1045-46 (9th Cir. 2006). The panel allowed the case to proceed on alternate standing grounds.

Then, on rehearing, the majority reversed itself and adopted the theory it had initially rejected. It concluded that "the Breens and Barnes-Wallaces have avoided Camp Balboa and the Aquatic Center because they object to the Boy Scouts' presence on, and control of, the land: They do not want to view signs posted by the Boy Scouts or interact with the Boy Scouts' representatives in order to gain access to the facilities." *Id.* at 784. The Article III injury-in-fact, according to the majority, was the Breens' and the Barnes-Wallaces'

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"offen[se]" at "the Boy Scouts' exclusion, and publicly expressed disapproval, of lesbians, atheists and agnostics," their "aversion to the facilities," and their "fe[elings of] unwelcome[ness] there because of the Boy Scouts' policies that discriminated against people like them." *Id.* at 783, 784. Having satisfied itself that it had jurisdiction, the panel then certified the California constitutional law questions to the California Supreme Court.²

2. This case is far more than a harmless certification order. It constitutes a precedential decision on the issue of standing. Even worse, if the Barnes-Wallaces and the Breens lose on the merits before the California Supreme Court, the panel majority's standing decision will be entirely insulated from further review. Thus, unless the City of San Diego files a petition for certiorari in the United States Supreme Court now, which, of course, it may do, *see* 28 U.S.C. § 1254, the majority's standing decision may be unreviewable.

Indeed, even before the merits of the Establishment Clause challenge have been resolved, the majority's opinion already has had collateral consequences. One district court in our circuit has already cited the majority's order as binding precedent to reach a conclusion it might not otherwise have reached. *See Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1205 (S.D. Cal. 2008) ("If Plaintiffs' claims were based on any theory other than violation of the Establishment Clause, they would likely be out of court for lack of standing . . . In the Ninth Circuit, however, merely being ideologically offended, and therefore reluctant to visit public land where a perceived Establishment Clause violation is occurring, suffices to establish 'injury in fact.' . . . *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 784-85 (9th Cir. 2008) (holding lesbian and agnostic parents had suffered injury in fact because they disagreed with the Boy Scouts' religious and moral position and therefore avoided recreational park facilities used by Boy Scouts). Bound by these precedents, the Court concludes all Plaintiffs have standing to bring this lawsuit.").

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Writing for herself in a separate concurrence, Judge Berzon compared the Breens and the Barnes-Wallaces' plight to Rosa Parks' refusal to ride in the back of segregated buses. According to Judge Berzon: "Just as African-Americans could ride on Montgomery's buses, but not in the front, the Scouts permit Plaintiffs to make use of Camp Balboa and the Mission Bay Park Aquatic Center, but do not allow them to be members of their organization and participate in the activities conducted at the camps for members." *Id.* at 791. Judge Kleinfeld dissented.

II

This case is most notable for what it does *not* involve. There is no economic injury here; the families did not compete with the Boy Scouts for the leases. Nor did the families try to join the Boy Scouts or to participate in Boy Scout activities in the parks. Thus, they cannot claim that they were excluded from anything. Most critically, the families did not even *try* to use, for their own purposes, the portions of the parks that the Boy Scouts control. Thus, they cannot even claim that they suffered any psychological injury as a result of associating with the *Boy Scouts*. Rather, the claim here is that the families are psychologically injured by *the thought of* associating with the Boy Scouts; they contend that they *would be* offended by the Boy Scouts' views *if* they chose to use the parks.

That is an unprecedeted theory. It splits standing law at the seams, forcing open the courthouse doors to

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plaintiffs without concrete, particularized injuries. Henceforth, a plaintiff need only assert that he *would* be offended if he chose to interact with someone whose beliefs offend him. Does this mean that an animal rights activist may sue the owner of a hot dog stand located on government property for buying beef from ranchers in violation of FDA health requirements, even if the activist has never visited the stand? Should the activist so much as allege that she *wants* to visit the stand but is offended by the stand owner's implicit endorsement of how range cattle are treated in Kansas or by the owner's reluctance to hire PETA activists, the majority, it seems to me, would roll out the red carpet.

An example from Judge Kleinfeld's dissent from the panel's decision sharpens the issue: If a Jewish plaintiff challenges a government lease to the Protestant Church to operate a non-discriminatory recreational facility that the plaintiff has never visited, may the Jewish plaintiff base standing on the grounds that the Protestant Church prevents him from serving as a minister? *Barnes-Wallace*, 530 F.3d at 797 n.27 (Kleinfeld, J., dissenting). Again, nothing in the majority's analysis forecloses such claims. After today, the only real hard and fast limit on a plaintiff's standing to sue that I can see will be the viability of the underlying claim on the merits.

In her concurrence, Judge Berzon tries to limit the sweeping reach of the majority's standing analysis. She says:

To succeed on the standing theory the majority adopts, such would-be plaintiffs

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would have to show (1) that on the property leased to that group by the city there is some site or facility which the individual plaintiffs could have and *would have* visited and used, were it not for (2) that group having an exclusionary policy that *directly* and *personally* affects the plaintiffs, and (3) that use of the property would require interaction with the group, such as paying fees for use of the facility, and perception of its symbols.

Id. at 793.

Judge Berzon's supposed limits are ephemeral. Putting aside the important fact that these "limits" appear in a one-judge concurrence without precedential value, any plaintiff can insert into his complaint the throwaway line, which is nearly impossible to disprove, that he "would visit" or "would use" a given piece of property. Many groups have exclusionary membership policies. Indeed, the ability to exclude those who do not share the group's goals or commitments is an integral part of what defines a *group*. And the use of the property almost always will "require interaction with the group." Organizations generally don't lease government property only not to use it.

III

By stretching the definition of an injury-in-fact beyond the breaking point to include injuries-in-theory, the majority's opinion is also inconsistent with

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longstanding Supreme Court precedent. In *Valley Forge v. Ams. United for Separation of Church & State*, 454 U.S. 464 (1982), the Supreme Court rejected a standing claim that is materially indistinguishable from the one raised by the Breens and the Barnes-Wallaces. There, the federal government gave surplus property to the Valley Forge Christian College, which was dedicated to “offer[ing] systematic training on the collegiate level to men and women for Christian service as either ministers or laymen.” *Id.* at 468 (internal quotation marks omitted). Americans United For Separation of Church and State “learned of the conveyance through a news release” and challenged the property transfer under the Establishment Clause of the First Amendment. *Id.* at 469. The Court held that standing was lacking, concluding that the plaintiffs “fail [ed] to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees.” *Id.* at 485.

As the first incarnation of the majority’s certification order correctly recognized, *Valley Forge* resolves this case. Like the plaintiffs in *Valley Forge*, the Breens and the Barnes Wallaces’ claim of “psychological” injury stems from “observation of conduct with which [they] disagree[],” *id.*, an injury that is not legally cognizable.

But the majority changed its mind. This time around, it distinguishes *Valley Forge* on the grounds that the

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Breens and the Barnes-Wallaces "have expressed a desire to make personal use of the facilities" while the *Valley Forge* plaintiffs learned of the property grant through a news release. That is a distinction without a difference. Judge Kleinfeld got it right when he said:

The *ratio decidendi* of *Valley Forge* does not support this distinction. *Valley Forge* holds that "psychological" injury caused by "observation" of "conduct with which one disagrees" is not a concrete injury to a legally protected interest sufficient to confer standing, and that is what the plaintiffs allege. Thus being there and seeing the offending conduct does not confer standing.

Barnes-Wallace, 530 F.3d at 795. In other words, the point of *Valley Forge* is that psychological injury does not constitute a legally cognizable injury-in-fact.

Even if *Valley Forge* admits of some limited class of psychological injuries that can constitute an injury-in-fact, which I do not think it does, certainly such a class is not present in this case. Like the *Valley Forge* plaintiffs, the Breens and the Barnes-Wallaces did not even try to use the parts of the parks that are run by the Boy Scouts. Therefore, the distinction between the two cases reduces to the allegation made by the Breens and the Barnes-Wallaces' that they *would* use the parks if the Boy Scouts were not there. As discussed above, the ease of inserting such an allegation into a future complaint makes that distinction meaningless.

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IV

The majority also bases its conclusions on our “giant cross” cases, which involved challenges to large, visible crosses on public land. See *Buono v. Norton*, 371 F.3d 543, 546-47 (9th Cir. 2004) (cert. pending); *Ellis v. La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993). *Buono* involved a cross on federally-owned property “bolted to a rock outcropping rising fifteen to twenty feet above grade and . . . visible to vehicles on the adjacent road from a hundred yards away.” *Buono*, 371 F.3d at 549. In *Ellis*, there were two 36 and 43-foot tall crosses on government property and one on the city’s official insignia. *Ellis*, 990 F.2d 1520. In both cases, the plaintiffs claimed that they were “deeply offended by the cross display on public land,” *Buono*, 371 F.3d at 546, and were “injured due to . . . not being able to freely use public areas.” *Ellis*, 990 F.2d at 1523 (internal citation and quotation marks omitted). We concluded that the plaintiffs had standing in those cases based on being offended by the presence of the crosses.

The cross cases, however, do not support the majority’s analysis. First, as our sister circuits have recognized, cross and religious display cases occupy their own special corner of standing jurisprudence. See *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997) (“Religious display cases are an even more particularized subclass of Establishment Clause standing jurisprudence”). This is so because “[i]n the religious display and prayer cases, the Government . . . actively and directly communicat[es] a religious message

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through religious words or religious symbols — in other words, it . . . engag[es] in religious speech that [is] observed, read, or heard by the plaintiffs.” *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008). Such “direct contact with an unwelcome religious exercise or display works a personal injury distinct from and in addition to each citizen’s general grievance against unconstitutional government conduct.” *Suhre*, 131 F.3d at 1086. Our cross cases have also emphasized the distinctly religious nature of the government conduct at issue. In concluding that the plaintiffs had standing to challenge the crosses in *Buono*, we held that “plaintiffs who . . . are offended by *religious displays on government property* ” have standing to challenge the displays. *Buono*, 371 F.3d at 548 (emphasis added).

The outdoorsy perambulations of a bunch of Boy Scouts hardly constitute a “religious display[] on government property.” *Id.* Indeed, there are no religious displays whatsoever on the public lands leased by the Boy Scouts. As Judge Kleinfeld put it: “Unlike a cross, neither a Boy Scout, nor the Boy Scout emblem (an eagle with a shield on a fleur-de-lis), nor a sign saying ‘Boy Scouts,’ is the central symbol of any religion or sexual preference.” The Boy Scouts are more concerned with “knot tying . . . camping, boating, hiking, swimming, and charitable activities.” *Barnes-Wallace*, 530 F.3d at 797. Judge Kleinfeld is plainly right when he says that “[a] gigantic cross on a mountaintop carries religious significance that a herd of 11 year old boys camping out and swimming does not.” *Id.*

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Judge Kleinfeld is also right to see

a distinction between a prominent display of an unambiguous religious symbol on public land and groups with myriad viewpoints working with government to facilitate public use of lands. San Diego, like many municipalities, leases property to many non-profit groups: San Diego Calvary Korean Church, Point Loma Community Presbyterian Church, the Jewish Community Center, the Vietnamese Federation, the Black Police Officers Association, and ElderHelp. No doubt people can be found in San Diego who do not like Koreans, Presbyterians, Jews, Vietnamese, Blacks, and old people, and who disagree with the beliefs people in these groups share. Their feelings of disagreement or dislike should not be treated as the “concrete injury” that is “an invasion of a legally protected interest” required for standing.

Id.

Even if the Boy Scouts *are* somehow a “religious display,” the panel majority is still wrong. In the cross and religious display cases, the plaintiffs came into “direct contact” with the offensive exhibition in question; they did not launch challenges from afar. In *Buono*, for example, the plaintiff “regularly [visited] the Preserve” where the cross was located. *Buono*, 371 F.3d at 546

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(internal citation and quotation marks omitted); *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007) (noting that Vasquez had “daily contact with the revised [city] seal” (internal quotation marks omitted)). Indeed, courts have vigilantly denied standing even in religious display cases when the plaintiff did not have any “personal contact” with the display. See, e.g., *ACLU-NJ v Township of Wall*, 246 F.3d 258, 266 (3d Cir. 2001). Here, of course, the BREENS and the Barnes-Wallaces have not even tried to use the lands controlled by the Boy Scouts. They have no “direct contact” or “unwelcome personal contact” with the Boy Scouts apart from their presence on the parts of the parks that the Boy Scouts do not control.

Thus, the majority’s order creates needless tension with cases in our sister circuits and in our own court, which, as discussed above, require direct, personal contact with the offensive religious symbol. See, e.g., *Sullivan v. Syracuse Hous. Auth.*, 962 F.2d 1101, 1107-08 (2d Cir. 1992); *ACLU-NJ*, 246 F.3d at 266 (Third Circuit); *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 489-90 (6th Cir. 2004) (“Davis [is] a lawyer who travels to and must practice law within DeWeese’s courtroom from time to time. There, Davis has and would continue to come into direct, unwelcome contact with the Ten Commandments display.”); *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir. 1987) (“[A]t least three of the plaintiffs regularly receive correspondence on city stationery bearing the seal [T]he presence of . . . the seal offends the appellants because the seal represents the City’s endorsement of Christianity.”); *Vasquez*, 487 F.3d at 1249 (Ninth Circuit); *Caldwell v. Caldwell*, 2008 WL 4444310, at *4-5 (9th Cir. Oct. 3, 2008).

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V

The panel majority's certification order treats standing as a nuisance to be swatted aside rather than as "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Standing serves a purpose in our system of government. "The power to declare the rights of individuals and to measure the authority of governments, [the Supreme Court] said 90 years ago, is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." *Valley Forge*, 454 U.S. at 471 (internal quotation marks omitted). By unjustifiably re-inventing the holdings of our religious display cases, the panel majority disregards these limits.

I acknowledge that those limits are not always clear and bright or easily discernible. Still, "[t]he absence of precise definitions . . . hardly leaves courts at sea in applying the law of standing." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Some principles should be clear. This is one of them. A plaintiff who is psychologically injured by the mere thought of associating with people who hold different views cannot claim that he has suffered a legally cognizable injury-in-fact.

VI

For the foregoing reasons, I respectfully dissent from our failure to rehear this case en banc.

**APPENDIX B — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
FILED JUNE 11, 2008**

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 04-55732

D.C. No. CV-00-01726 NAJ/AJB

MITCHELL BARNES-WALLACE;
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Plaintiffs-Appellees,

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CITY OF SAN DIEGO,

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DESERT PACIFIC COUNCIL,

Defendant-Appellant.

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No. 04-56167

D.C. No. CV-00-01726 NAJ/AJB

MITCHELL BARNES-WALLACE; MAXWELL BREEN; LORI BARNES-WALLACE, Guardian Ad Litem; LYNN BARNES-WALLACE, Guardian Ad Litem; MICHAEL BREEN, Guardian Ad Litem; VALERIE BREEN, Guardian Ad Litem,

Plaintiffs-Appellants,

v.

CITY OF SAN DIEGO; BOY SCOUTS OF AMERICA - DESERT PACIFIC COUNCIL,

Defendants-Appellees.

**ORDER CERTIFYING QUESTIONS TO THE
SUPREME COURT OF CALIFORNIA**

Filed June 11, 2008

Before: William C. Canby, Jr., Andrew J. Kleinfeld,
and Marsha S. Berzon, Circuit Judges.

Order;
Concurrence by Judge Berzon;
Dissent by Judge Kleinfeld

ORDER

We respectfully request the California Supreme Court to exercise its discretion and decide the certified

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questions presented below. *See Cal. R. Ct. 8.548.* The resolution of any one of these questions could determine the outcome of this appeal and no controlling California precedent exists. *See id.* We are aware of the California Supreme Court's demanding caseload and recognize that our request adds to that load. But we feel compelled to request certification because this case raises difficult questions of state constitutional law with potentially broad implications for California citizens' civil and religious liberties. Considerations of comity and federalism favor the resolution of such questions by the State's highest court rather than this court.

I. Questions Certified

The Desert Pacific Council, a nonprofit corporation chartered by the Boy Scouts of America, leases land from the City of San Diego in Balboa Park and Mission Bay Park. The Council pays no rent for the Mission Bay property and one dollar per year in rent for the Balboa Park property. In return, the Council operates Balboa Park's campground and Mission Bay Park's Youth Aquatic Center. The campground and the Aquatic Center are public facilities, but the Council maintains its headquarters on the campground, and its members extensively use both facilities. The Boy Scouts of America — and in turn the Council — prohibit atheists, agnostics, and homosexuals from being members or volunteers and require members to affirm a belief in God.

The plaintiffs are users of the two Parks who are, respectively, lesbians and agnostics. They would use the

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land or facilities leased by the Desert Pacific Council but for the Council's and Boy Scouts' discriminatory policies.

We certify to the California Supreme Court the following questions:

1. Do the leases interfere with the free exercise and enjoyment of religion by granting preference for a religious organization in violation of the No Preference Clause in article I, section 4 of the California Constitution?
2. Are the leases "aid" for purposes of the No Aid Clause of article XVI, section 5 of the California Constitution?
3. If the leases are aid, are they benefiting a "creed" or "sectarian purpose" in violation of the No Aid Clause?

The California Supreme Court is not bound by this court's presentation of the questions. We will accept a reformulation of the questions and will accept the Supreme Court's decision. To aid the Supreme Court in deciding whether to accept the certification, we provide the following statement of facts, jurisdictional analysis, and explanation.

*Appendix B***II. Statement of Facts**

Because the district court granted summary judgment against it, we take the facts in the light most favorable to the non-moving party, the Desert Pacific Council. *See Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

A. The Parties

The Desert Pacific Council (the “Council”) is a nonprofit corporation chartered by The Boy Scouts of America to administer Scouting programs in the San Diego area. Congress chartered the Boy Scouts of America “to promote . . . the ability of boys to do things for themselves and others . . . and to teach them patriotism, courage, self-reliance, and kindred virtues.” 36 U.S.C. § 30902 (2006). While Scouting focuses primarily on outdoor activity, the Boy Scouts’ rules include a prohibition against allowing youths or adults who are atheists, agnostics, or homosexuals to be members or volunteers. Cf *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659-61 (2000) (holding that the Boy Scouts have a constitutional right to exclude homosexuals). These rules bind the Council. The Boy Scouts maintain that agnosticism, atheism, and homosexuality are inconsistent with their goals and with the obligations of their members. *See Randall v. Orange County Council, Boy Scouts of Am.*, 17 Cal. 4th 736, 742 (1998) (reciting that, in defending its right to exclude atheists, the Boy Scouts introduced “evidence intended to establish that

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requiring the inclusion of nonbelievers . . . would interfere with the organization's efforts to convey its religious message").

The Boy Scouts do not require scouts to affiliate with any religious organization, and the Boy Scouts style themselves "absolutely nonsectarian." [ER 309 (75:7-8), 1580, art. IX § 1, cl. 1; *see also, e.g.*, ER 1527; ER 54 ¶ 185, ER 2007 ¶ 185.]¹ The San Diego Boy Scouts are "not a house of worship like a church or synagogue." [ER 54 ¶ 185; ER 2007 ¶ 185.] Still, the organization has a religious element. All members and volunteers take an oath to "do my best . . . [t]o do my duty to God and my country" and to remain "morally straight." [ER 2005 ¶ 176.] The organization's mission is "to prepare young people to make ethical choices over their lifetimes by instilling in them the values of the Scout Oath and Law." [ER 2003 ¶ 162.] Duty to God is placed first in the Oath as "the most important of all Scouting values." [ER 2004 ¶ 170.] Members also must agree to uphold the "Scout Law," which provides that a Scout is "faithful in his religious duties." [ER 2005 ¶ 177.] Membership and leadership applications contain a "Declaration of Religious Principle," which explains that "no member can grow into the best kind of citizen without recognizing an obligation to God." [ER 1535.] The Boy Scouts

1. The bracketed citations of ER and SER refer, respectively, to the Excerpts of Record and the Supplemental Excerpts of Record filed by the parties in this court. The references are included in this Order for the convenience of the California Supreme Court, should it choose to request this court to furnish those Excerpts. See Cal. R. Ct. 8.548(c).

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instruct leaders to "be positive in their religious influence and [to] encourage Scouts to earn the religious emblem of their faith." [ER 1527.]

The plaintiffs Barnes-Wallaces are a lesbian couple and the plaintiffs Breens are agnostics. Because of their sexual and religious orientations, they cannot be Boy Scout volunteers. Both couples have sons old enough to join the Boy Scouts, and they would like their sons to use the leased facilities, but the parents refuse to give the approval required for membership. As part of the membership application, a parent must promise to assist his or her son "in observing the policies of the Boy Scouts of America . . . [to] serve as his adult partner and participate in all meetings and approve his advancement." [*Id.* 1533.] The application also includes the Scout Law and the Declaration of Religious Principle. The Barnes-Wallaces and the Breens believe that the Boy Scouts' policies are discriminatory, and they refuse to condone such practices by allowing their children to join the Boy Scouts.

B. The Leases

In accord with its long history of "encourag[ing] nonprofit organizations to develop cultural, educational, and recreational programs" on the City property, the plaintiffs' home town of San Diego has leased 123 public properties to various nonprofit organizations.² [SER 10,

2. These organizations include religious organizations (e.g., San Diego Calvary Korean Church, Point Loma Community
(Cont'd)

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36.] One of these organizations is the Desert Pacific Council, which leases, occupies, and operates portions of two popular city parks. Other portions of those parks are extensively used by the plaintiff families. Under the original lease, the Council paid one dollar per year in rent. In 2002 the parties entered into a new twenty-five-year lease, which requires the Desert Pacific Council to pay one dollar in annual rent and a \$2,500 annual administration fee.

The City negotiated this lease with the Council on an exclusive basis, as it sometimes does with groups, religious or secular, that it deems to be appropriate operators of a particular piece of City property. [ER 843-44, 850 (132:8-23); SER 433-34, 592 (135:7-20), 1168, 1172-73, 1175, 1182-83, 1185-86, 1189.] Other organizations receive similar terms. Some ninety-six of the City's leases to non-profits (including nineteen leases to youth-oriented recreational non-profits) require no rent or rent less than the \$2,500 fee the Council pays, and fifty of them have terms twenty-five years or longer. [SER 12-15, 27-29.] Although they produce little to no revenue, these leases save the City some money by placing the

(Cont'd)

Presbyterian Church, Jewish Community Center, Salvation Army), organizations concerned with children or the elderly (e.g., Camp Fire, Girl Scouts, ElderHelp, Little League), organizations that limit their membership or services on the basis of race or ethnicity (e.g., Vietnamese Federation of San Diego, Black Police Officers Association), and art museums and similar institutions (e.g., San Diego Art Institute, Old Globe Theater) [SER 11, 14, 27-29].

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costs of maintenance and improvement upon the lessee organizations. [SER 204-05.] The City spends nothing on the properties leased to the Council. [SER 3 ¶ 9, 5 ¶ 17.]

The Council leases from the City sixteen acres in Balboa Park known as Camp Balboa. Camp Balboa offers a "unique" urban camping opportunity in the "heart of the City." [ER 1966 ¶ 7.] The site includes campgrounds, a swimming pool, an amphitheater, a program lodge, a picnic area, a ham radio room, restrooms and showers, and a camp ranger office. The lease requires the Council to maintain the property and to expend at least \$1.7 million for capital improvements over seven years. [ER 820.] The Boy Scouts have landscaped, constructed recreational facilities, and installed water and power on the property. [SER 217 ¶ 17.]

Similarly, under the Fiesta Island lease, the Boy Scouts spent approximately \$2.5 million to build the Youth Aquatic Center [SER 215 ¶ 10, 1084 ¶ 19]. The facility offers the use of kayaks, canoes, sail and row boats, and classroom space to other youth groups at inexpensive rates. [SER 215-16 ¶¶ 10-11.]

C. Occupancy of the Land

The Desert Pacific Council makes exclusive use of portions of Balboa Park for its own benefit. The Council has its headquarters on park property. From this facility it oversees its \$3.7 million budget, manages its thirty employees, and processes applications for membership

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and leadership positions. The Council also has a print shop on park land that it uses to print literature for its members. These portions of the park are unavailable for public use.

Other portions of Camp Balboa and the Youth Aquatic Center are available for use by non-member groups, but the Council manages reservations of these recreational facilities. Campsites at Camp Balboa are available on a first-come, first-served basis. [SER 295, 307, 617-18.] Thus, if the plaintiffs were to use the land, they would have to do so subject to the Council's oversight. The Council can declare the camp "closed," determine how many people are going to attend the camps, and then open up only the unreserved facilities to the public. Nonetheless, numerous other groups have camped in the campsites while camp was in session, and the San Diego Boy Scouts have not turned any non-Scout group away from Camp Balboa during that time. [SER 291 (171:3-6); *see also* SER 624 (156:16-157:16); 291 (170:13-15)]. The Camp charges a small fee for camping, but the revenue from fees is insufficient to cover the cost of maintaining the camp facilities. [SER 218].

The Council also leases land from the City on Fiesta Island in Mission Bay Park. In 1987, the City entered into a twenty five-year, rent-free lease with the Desert Pacific Council for one-half acre of waterfront property on Fiesta Island. The City entered into this lease after the Desert Pacific Council approached it about building and operating an aquatic center on the island. The

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Council was awarded the lease on the condition that it expend \$1.5 million to build the Youth Aquatic Center. At a price of about \$2.5 million [SER 1084 ¶ 19], the Council built and now operates the Aquatic Center, which offers boating, sailing, canoeing, and kayaking to San Diego youth.

As at Camp Balboa, reservations to use the Youth Aquatic Center are made through the Council. The Aquatic Center has a formal first-come, first-served policy, but the policy has exceptions for Scout members. The Desert Pacific Council is permitted to reserve up to 75% of the facilities seven days in advance. The Council also hosts a members-only camp for four weeks each summer. The reservation books during camp say "YAC Closed for Summer Camp," although the Boy Scouts' use of the Aquatic Center during those weeks is not exclusive. [SER 216-17, 317.] While the public cannot use the Aquatic Center during summer camp for water-based activities, it can reserve dormitories or other facilities the Scouts are not using. In practice, non-members often use portions of the facilities more than members do. [SER 216-18.] The San Diego Boy Scouts have not turned away any non-Scout group while Scouting is in session, either at Camp Balboa or at the Aquatic Center. [SER 291 (170:13-15, 171:3-6), 315 (227:11-14).] The Center charges fees for use, but there is no evidence that the fees equal or exceed the cost of maintaining the facilities.

There are no religious symbols either at Camp Balboa or at the Youth Aquatic Center.

*Appendix B***D. The Plaintiffs' Injury**

The plaintiffs never applied to use the Youth Aquatic Center or Camp Balboa; there is no evidence that the Council actively excluded them. [SER 235-36 (104:24-106:10), 244 (91:25-93:23), 251-52 (33:2-35:10).] Rather, they testified that the Council's occupation and control of the land deterred them from using the land at all. The plaintiffs desired to make use of the recreational facilities at Camp Balboa and the Youth Aquatic Center, but not under the Council's authority. As a result, they actively avoided the land. They refused to condone the Boy Scouts' exclusionary policies by seeking permission from the Boy Scouts to use the leased facilities or by using the leased facilities subject to the Boy Scouts' ownership and control. [ER 85, 370-71; SER 252 (35:12-15; 36:2-5).] They had an aversion to the facilities and felt unwelcome there because of the Boy Scouts' policies that discriminated against people like them. [ER 369; SER 254 (74:4-10)].

The plaintiff families brought this action against the City of San Diego, the Boy Scouts, and the Desert Pacific Council, alleging that leasing public land to an organization that excludes persons because of their religious and sexual orientations violates the federal Establishment Clause, the California Constitution's No Preference³ and No

3. This Clause provides, in relevant part:

Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This
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Aid⁴ Clauses, the federal and state Equal Protection Clauses, the San Diego Human Dignity Ordinance, and state contract law. The district court found the plaintiffs had standing as municipal taxpayers and then allowed them to file an amended complaint. Both parties sought summary judgment. The court found that the leases violated the federal Establishment Clause and the California No Aid and No Preference Clauses and granted summary judgment in the plaintiffs' favor. *Barnes-Wallace v. Boy Scouts of Am.*, 275 F.Supp.2d 1259, 1276-80 (S.D. Cal. 2003). In the amended final judgment, the court enjoined the Balboa Park and Fiesta Island leases. The City then notified the Council that under the terms of the 2002 Balboa Park lease, the term tenancy was terminated and converted to a month-to-

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liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.

Cal. Const. art. I, sec. 4.

4. This Clause states:

Neither the legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose

Cal. Const. art. XVI, sec. 5.

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month tenancy. The plaintiffs have since settled with the City. The Scout defendants appealed the district court's ruling.

III. Jurisdictional Analysis

Before proceeding further, we must satisfy ourselves that we have jurisdiction over this appeal. We have statutory jurisdiction over the appeal under 28 U.S.C. § 1291, but the parties have presented challenges to the existence of a case or controversy that is essential to our constitutional jurisdiction under Article III. See *Harrison W. Corp. v. United States*, 792 F.2d 1391, 1392 (9th Cir. 1986). We address these issues as threshold matters.

A. Mootness

The plaintiffs argue that the appeal is moot as to the Balboa Park lease because the City terminated the lease after the district court's final judgment. The appeal is not moot because the Desert Pacific Council still has "a legally cognizable interest for which the courts can grant a remedy." *Alaska Ctr. for the Env't v. U.S. Forest Service*, 189 F.3d 851, 854 (9th Cir. 1999). The City did not terminate the Desert Pacific Council's tenancy, but rather converted it to a month-to-month, holdover tenancy. The Council still occupies Camp Balboa, and the permissibility of its tenancy remains at issue in this appeal. Moreover, the City's notice terminating the lease indicated that, if the district court's judgment is reversed, the termination notice will

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be of no effect. The controversy with regard to the Balboa Park lease is not moot.

B. Standing

The Boy Scouts challenge the standing of plaintiffs to bring this action. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (explaining that standing is a component of the case-or-controversy requirement). Because the case was decided on summary judgment in the district court, the plaintiffs had the burden of showing by uncontested facts that they had standing to challenge the leases. *See id.* at 561. We conclude that the plaintiffs have sustained that burden, but we base standing on a different ground from that adopted by the district court.

The Barnes-Wallaces and the Breens have standing to pursue their claims because uncontested evidence shows that they suffered injury-in-fact traceable to the Scout defendants' conduct, and that a favorable decision is likely to redress their injuries. *See Lujan*, 504 U.S. at 560-61. The Barnes-Wallaces and the Breens submitted declarations asserting, without contradiction by the Scout defendants, that they would like to use Camp Balboa and the Aquatic Center, but that they avoid doing so because they are offended by the Boy Scouts' exclusion, and publicly expressed disapproval, of lesbians, atheists and agnostics. The plaintiffs also object to the Boy Scouts' control of access to the facilities, noting that their use of the land would require "go[ing] through" the Boy Scouts and passing by symbols of its presence and dominion.

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We have held that comparable restrictions on plaintiffs' use of land constitute redressable injuries for the purposes of Article III standing. Our Establishment Clause cases have recognized an injury-in-fact when a religious display causes an individual such distress that she can no longer enjoy the land on which the display is situated. In *Buono v. Norton*, the plaintiff, a practicing Roman Catholic, was so offended by the "establishment" of a cross on public land that he avoided passing through or visiting the land. 371 F.3d 543, 546-47 (9th Cir. 2004). We concluded that Buono's "inability to unreservedly use public land" constituted an injury-in-fact, reasoning that Buono's avoidance of the land was a personal injury suffered "*as a consequence* of the alleged constitutional error." *Id.* at 547 (internal quotation marks omitted); *see also Ellis v. La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993) (finding standing where plaintiffs avoided using land on which cross was displayed).

Similarly, the Breens and Barnes-Wallaces have avoided Camp Balboa and the Aquatic Center because they object to the Boy Scouts' presence on, and control of, the land: They do not want to view signs posted by the Boy Scouts or interact with the Boy Scouts' representatives in order to gain access to the facilities. As in *Buono*, they have alleged injuries beyond "the psychological consequence presumably produced by observation of conduct with which [they] disagree[]," because their inhibition interferes with their personal use of the land. *Valley Forge Christian Coll. v. Am. United for Separation of Church & State*, 454 U.S. 464, 485 (1982). Indeed, the plaintiffs' emotional injuries are

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stronger than those of the Catholic plaintiff in *Buono*, because they belong to the very groups excluded and disapproved of by the Boy Scouts, and because they would be confronted with symbols of the Boy Scouts' belief system if they used or attempted to gain access to Balboa Park and the Aquatic Center.

We also have found standing, in environmental cases, when plaintiffs' enjoyment of land would suffer because of treatment of the land or events occurring on the land. See *Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1068 (9th Cir. 1997) (plaintiffs "demonstrate aesthetic and recreational harm that will support standing" when noise, trash, and wakes of vessels in national park diminished plaintiffs' enjoyment of the land); *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 860 (9th Cir. 2005) (holding that plaintiff organization suffered injury from increased risk of oil spill that would impair its aesthetic or recreational enjoyment of a stretch of Alaskan coastline). The plaintiffs' enjoyment of the Council-operated facilities is similarly threatened by the Boy Scouts' presence and activities. The plaintiffs are faced with the choice of not using Camp Balboa and the Aquatic Center, which they wish to use, or making their family excursions under the dominion of an organization that openly rejects their beliefs and sexual orientation. This is not a case where the plaintiffs have no plan to use the land in question. See *Lujan*, 504 U.S. at 564 (requiring "concrete plans" to visit place of environmental harm for a finding of actual and imminent injury). The plaintiffs accordingly have alleged a concrete recreational loss.

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We conclude that, even with the facts construed favorably to the Scout defendants, the plaintiffs have shown both personal emotional harm and the loss of recreational enjoyment, resulting from the Boy Scouts' use and control of Camp Balboa and the Aquatic Center. These injuries, which are likely to be redressed by a favorable decision, satisfy the standing requirements of Article III of the Constitution.

The Scout defendants argue that, as in *Valley Forge*, the plaintiffs' alleged injuries are based on abstract "feelings" and "beliefs" about the Boy Scouts, and therefore are inadequate to confer standing. We conclude that *Valley Forge* does not control this case. The *Valley Forge* plaintiffs, who resided in Maryland and Virginia, learned through a news release of a transfer of federal land in Pennsylvania to a sectarian college. They attempted to challenge the transfer in federal court. *Valley Forge*, 454 U.S. at 487. They did not purport to have an interest in using the land at issue. See *id.* at 486 ("We simply cannot see that respondents have alleged an *injury of any kind*, economic or otherwise, sufficient to confer standing.") (emphasis in original). In contrast, the Breenes and Barnes-Wallaces reside in San Diego, where Camp Balboa and the Aquatic Park are located, and have expressed a desire to make personal use of the facilities operated by the Council. They can hardly be characterized as individuals who "roam the country in search of governmental wrongdoing." *Id.* at 487; *see also*

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Allen v. Wright, 468 U.S. 737, 755-56 (1984).⁵ Moreover, the plaintiffs here are lesbians and agnostics, members of the classes of individuals excluded and publicly disapproved of by the Boy Scouts. They are not bystanders expressing ideological disapproval of the government's conduct. The plaintiffs' personal interest in the land at issue, and the personal nature of their objection to the Scout defendants' use of the land, take this case outside of the scope of *Valley Forge*.⁶

5. In *Allen*, the Supreme Court held that a stigmatic injury caused by racial discrimination could support standing only if the plaintiffs personally had been or were likely to be subject to the challenged discrimination. *Allen*, 468 U.S. at 755-56. The injury of which the Barnes-Wallaces and Breeches complain is the offensiveness of having to deal with the Boy Scouts in order to use park facilities that they wish to use, and would use, but for the control of the Boy Scouts over those facilities. We conclude that this injury is sufficiently immediate to these plaintiffs to permit standing under the rationale of *Allen*.

6. The dissent to this order points out that we originally rejected this theory of standing on the ground that no obvious religious displays were present at the Camp or Aquatic Center. The majority of the panel concludes, however, that the earlier reasoning was incorrect. Psychological injury can be caused by symbols or activities other than large crosses. See *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (holding that stigma of discrimination confers standing even though remedy may confer no material benefit). Here, the psychological injury is generated primarily not by plaintiffs' own beliefs but by the Boy Scouts' disapproval of the plaintiffs and people like them. As *Buono* points out, the problem with standing in *Valley Forge*

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*Appendix B***C. The Plaintiffs' Alternative Theories of Standing**

We reject the plaintiffs' other theories of standing: the theory that they have standing as taxpayers and the theory that they suffered injury from the Council's policy of preferential access to the leased property. We disagree with the district court and conclude that the plaintiffs do not have standing as municipal taxpayers because they have not suffered a "direct dollars-and-cents injury." *Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429, 434 (1952). The plaintiffs characterize the nominal-rent leases as tax expenditures, but the Supreme Court recently made clear that a government's forgoing of revenue is not the equivalent of an expenditure. *DaimlerChrysler Corp. v. Cuno*, 126 S.Ct. 1854, 1862 (2006).⁷ The Court rested its holding in part on the fact that the plaintiff taxpayers' injury was not "actual or imminent" because the tax

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was not the nature of the psychological injury but "the absence of any personal injury at all." *Buono*, 371 F.3d at 547. A psychological injury that is generated by demeaning actions directed at the plaintiffs and that causes the plaintiff to avoid a public area that he wishes to use is sufficient to overcome that problem and confer standing. *See id.*

7. The district court did not have the benefit of *DaimlerChrysler* at the time it ruled that the plaintiffs had taxpayer standing.

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break—designed to stimulate the economy—would not necessarily lower government revenues. *Id.* at 1862. Similarly, this court has held that municipal taxpayers must show an expenditure of public funds to have standing. *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 793-97 (9th Cir. 1999); *Cammack v. Waihee*, 932 F.2d 765, 770 (9th Cir. 1991). The plaintiffs' injury is not actual or imminent because it is unclear whether San Diego loses money by charging nominal rent but requiring lessees to maintain and improve the leased property.

The leases are more reasonably characterized as a potential loss of municipal revenues, but even this loss is not definite enough to create municipal taxpayer standing. There is no evidence that, if the leases were invalidated, the City would use the land to generate revenue. See *DaimlerChrysler*, 126 S. Ct. at 1862 (finding the plaintiff taxpayers' alleged injury too conjectural because it depended on legislators' responses to the tax breaks in question). For example, the City's Director of Real Estate testified that “[t]he City would likely seek another lessee to operate a recreational facility . . . under similar terms and conditions in the existing [Youth Aquatic Center] lease . . . [because the] City Council has never had a policy of using the [Youth Aquatic Center] property in a manner that maximizes the revenue that potentially could be generated by this site.” [SER 4 ¶ 12.] More generally, the Director stated that “the City has not historically sought to obtain market rent from nonprofit lessees of dedicated parkland.” Without a definite expenditure of municipal funds, plaintiffs do not have standing as municipal taxpayers.

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DaimlerChrysler, 126 S. Ct. at 1862; *Cammack*, 932 F.2d at 770-71.

Nor can the plaintiffs claim standing on the basis of the Council's policy of granting preferential access to the Boy Scouts. Even if the Council excludes other groups in favor of Boy Scouts—a disputed fact here—the plaintiffs cannot show injury from this policy. The plaintiffs have insisted that they would not use the facilities while the Boy Scouts are lessees. The plaintiffs never contacted the Boy Scouts about using the facilities, and they admitted they knew little or nothing about the Boy Scouts' policies regarding access to the facilities. Without any plans to apply for access, the plaintiffs cannot show actual and imminent injury from a discriminatory policy of denying access. *See Lujan*, 504 U.S. at 564.

Moreover, the injury that we have concluded the plaintiffs *did* suffer cannot be redressed by correcting this access policy. As long as the Council as an organization maintains policies that exclude from participation and demean people in the plaintiffs' position, no amount of evenhanded access to the leased facilities will redress the plaintiffs' injury: emotional and recreational harm arising out of the Council's control and administration of public land that the plaintiffs wish to use. It is this injury, and not the alleged Boy Scouts' policy of preferential access to the facilities it operates,

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that supports plaintiffs' standing to maintain their claims under the federal and state religion clauses.⁸

IV. Explanation of Certification

A. The Need to Avoid Federal Constitutional Questions

"[F]ederal courts should not decide federal constitutional issues when alternative grounds yielding the same relief are available." *See Kuba v. 1-A Agric. Assoc.*, 387 F.3d 850, 856 (9th Cir. 2004). If the California Constitution provides an independent basis for relief, then there is "no need for decision of the federal issue." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 295 (1982). Yet any interpretation by this court of the State's constitutional clauses, unlike an interpretation by the California Supreme Court, cannot be authoritative. *See Bartoni-Corsi Produce, Inc. v. Wells Fargo Bank, N.A. (In re Bartoni-Corsi Produce, Inc.)*, 130 F.3d 857, 861 (9th Cir. 1997).

8. The dissent asserts that "[t]he Boy Scouts are entitled to gather together freely and reinforce the views they share." The complaint, however, does not challenge the right of the Boy Scouts to associate and share views; it challenges only their entitlement to manage a portion of the City's parks. Our discussion here relates only to whether the plaintiffs can bring this challenge, not to whether their claim ultimately will be found meritorious.

*Appendix B***B. The Need for Certification**

We certify three issues to the California Supreme Court because they require interpretation of the state constitution's religion clauses beyond that found in state or federal cases. These clauses affect the delicate relationship between the government and religion, and any interpretation of these clauses has significant public policy ramifications.

1. The No Preference Clause

The No Preference Clause states in part that “[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed.” Cal. Const. art. 1 § 4. The California Supreme Court “has never had occasion to definitively construe” this clause. *E. Bay Asian Local Dev. Corp. v. California*, 24 Cal. 4th 693, 719 (2000). Having not yet been faced with a case that requires it “to declare the scope and proper interpretation” of the clause, it has found no necessity to set the boundaries of the clause. See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 562 (2004). We therefore cannot accurately estimate from existing California Supreme Court cases how that Court would apply the No Preference Clause to the case before us. It is true that, in a case involving exemptions from a landmark preservation law for religious institutions, the California Supreme Court held that, because the challenged action passed the federal Establishment Clause test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), it also complied with

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California's No Preference Clause. *E. Bay Asian Local Dev. Corp.*, 24 Cal. 4th at 719; *see also Paulson v. Abdelnour*, 145 Cal. App. 4th 400, 434 (2006). It is not at all clear, however, whether the Boy Scouts' management of the park facilities complies with the *Lemon* test, and we follow the rule of not deciding federal constitutional questions when state law may be determinative. We know of no authority compelling the California courts to address the *Lemon* test in every challenge brought under the No Preference Clause. Any independent determination of a No Preference Clause issue by the California Supreme Court would be conclusive on this court and this litigation.

Although state intermediate appellate courts have construed the No Preference Clause, the unique facts of this case would require us to go beyond these decisions. *See, e.g., Woodland Hills Homeowners Org. v. Los Angeles Cnty. Coll. Dist.*, 218 Cal. App. 3d 79, 93-95 (1990); *Okrand v. City of Los Angeles*, 207 Cal. App. 3d 566, 571-72 (1989); *Bennett v. Livermore Unified Sch. Dist.*, 193 Cal. App. 3d 1012, 1016, 1024 (1987); *Feminist Women's Health Ctr., Inc. v. Philibosian*, 157 Cal. App. 3d 1076, 1092 (1984). For example, the plaintiff families challenge the process by which the leases were obtained, but no California court has identified the perspective from which we should scrutinize these processes to determine whether there has been a forbidden preference. The United States Supreme Court adopts the perspective of a reasonable observer when determining Establishment Clause questions, *see County of Allegheny v. ACLU, Greater*

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Pittsburgh Chapter, 492 U.S. 573, 635 (1989) (O'Connor, J., concurring in part and concurring in the judgment), but at least one Justice of the California Supreme Court has urged that courts interpreting the No Preference Clause “view the issue from the perspective of the minority.” *Sands v. Morongo Unified Sch. Dist.*, 53 Cal. 3d 863, 915-16 (Cal. 1991) (Arabian, J., concurring). Thus, we seek certification so that the California Supreme Court, rather than this federal court, can chart the proper course through these unresolved areas.

2. The No Aid Clause

The absence of controlling precedent in regard to the No Aid Clause presents us with an even greater problem, in part because that clause is without a parallel in the United States Constitution. The No Aid Clause prohibits the City from “mak[ing] an appropriation, or pay[ing] from any public fund whatever, or grant[ing] anything to or in aid of any religious sect, church, creed, or sectarian purpose” Cal. Const. art. XVI § 5. To assess whether the leases violate the No Aid Clause, we must determine whether the leases are aid and, if so, whether the City supports a creed or sectarian purpose by granting the aid to the Boy Scouts. The California Supreme Court has not been called upon to define “aid” in a manner that applies to the circumstances of this case. Nor has it been required to establish what is a “creed” or “sectarian purpose” to which aid cannot be given.

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In its most recent decision construing the No Aid Clause, *California Statewide Communities Development Auth. v. All Persons Interested in Validity of a Purchase Agreement*, 152 P.3d 1070 (Cal. 2007), the California Supreme Court held that the clause did not invalidate a public bond program that facilitated the raising of private money to benefit sectarian institutions. *Id.* at 1081. It had long been established that such aid could be given to religiously affiliated colleges so long as the funds were not used for religious purposes. The question for decision in *Statewide Communities* was whether the same rule applied to institutions that were "pervasively sectarian." *Id.* at 1072. No definition of "pervasively sectarian" was required, because the parties assumed for purposes of the case that the institutions in question were pervasively sectarian. *Id.* For the same reason, it was unnecessary to define precisely a "creed" or "sectarian purpose." The bond arrangement was held not to violate the No Aid Clause so long as the institutions did not use the bond proceeds for sectarian purposes and met certain other requirements, including the offering of a sufficiently broad curriculum of secular subjects. *Id.* at 1077, 1081. The *Statewide Communities* decision does not assist us, however, in determining whether the City's leases to the Boy Scouts violate the No Aid Clause, because the California Supreme Court emphasized that no public funds or real estate passed to the sectarian institutions. *Id.* at 1076. *Statewide Communities* therefore does not affect the need for certification in this case.

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The facts of this case also require us to go beyond the framework set forth in our own decision of *Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002) (en banc), for interpreting the No Aid Clause. *Paulson* concerned a No Aid Clause challenge to a municipal government's sale of public land containing a cross to a sectarian organization. *Paulson* concluded that the No Aid Clause "prohibits the government from (1) granting a benefit in any form (2) to any sectarian purpose (3) regardless of the government's secular purpose (4) unless the benefit is properly characterized as indirect, remote, or incidental." *Id.* at 1131. Whether the City granted a benefit to the Scout defendants for the advancement of a creed or sectarian purpose is a very different and more challenging question than that presented in *Paulson*. Resolution of this issue would require expanding our interpretation of California cases. An expansion or contraction of the definitions of "aid," "creed," or "sectarian purpose" could have a substantial impact upon Californians' liberties and the administration of their public lands. We are reluctant to embark on a refinement of the meaning of those terms without the authoritative assistance of the California Supreme Court. We thus ask that Court to exercise its discretion and decide whether the leases are aid and whether this aid benefits a creed or sectarian purpose.

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V. Administrative Information

The names and addresses of counsel for Lori, Lynn, and Mitchell Barnes-Wallace and Michael, Valerie, and Maxwell Breen are:

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As required by California Rules of Court 8.548(c) and (d), the Clerk of this Court shall submit copies of all relevant briefs and an original and ten (10) copies of this Order to the Supreme Court of California with a certificate of service on the parties.

VI. Stay and Withdrawal from Submission

All further proceedings in this case in this court are stayed, except for petitions for rehearing or rehearing en banc, or sua sponte calls for en banc rehearing, relating to this certification order. The Clerk will not transmit this order to the California Supreme Court for its consideration until time has run for any such petitions or calls and, if any such petitions or calls are made, until proceedings relating to such petitions or calls have been completed.

This case is withdrawn from submission until further order of this court. The parties shall notify the Clerk of this Court within one week after the California Supreme Court accepts or rejects certification, and again within one week if that Court renders an opinion.

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BERZON, Circuit Judge, concurring:

When Rosa Parks refused to ride in the back of a Montgomery bus one afternoon in 1955, she did so because she disagreed with a city government that let her make use of its services, but relegated her to second class status. When she and other African-American citizens decided to boycott the city's bus lines, they did so because they would rather avoid these public facilities than be forced to interact with an institution that denigrated them and excluded them from full citizenship — while at the same time “tolerating” their presence in the back of the bus.

Yet, when some of those citizens then sued the city of Montgomery, there was no argument then made that they lacked standing because the only injuries they asserted were merely the “psychological consequence [of] . . . observation of conduct with which one disagrees.” *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 485 (1982); compare *Browder v. Gayle*, 142 F. Supp. 707, 711 (M.D. Ala. 1956) (“[P]laintiffs, along with most other Negro citizens of the City of Montgomery, have . . . refrained from making use of the transportation facilities provided by Montgomery City Lines, Inc.”), aff’d, 352 U.S. 903 (1956).

Any comparison to the Jim Crow South may seem greatly overblown, and in most respects it certainly is. The Boy Scouts do not express disdain for homosexuals

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and atheists anywhere near as graphically or concretely as the Jim Crow South did blacks, and the Boy Scouts are only one group, not an entire society and governmental structure. And, on the merits, the issues here are entirely different from, and quite obviously nowhere near of the same magnitude of impact or historic significance as, those in the seminal desegregation cases.

But at this point — although the dissent carefully avoids so recognizing in excoriating my comparison — we are concerned only with standing: whether the Barnes-Wallace and Breen families have suffered an injury allowing them to be heard in court. And in its nature, though certainly not its degree, the *injury* that the Barnes-Wallace and Breen families claim is much the same as that suffered by the plaintiffs in the bus desegregation cases. Just as African-Americans could ride on Montgomery's buses, but not in the front, the Scouts permit Plaintiffs to make use of Camp Balboa and the Mission Bay Park Youth Aquatic Center, but do not allow them to be members of their organization and participate in the activities conducted at the camps for members. In either case, use of a valuable public facility is made contingent on acceptance of imposed second class status within a controlling organization's social hierarchy.

Judge Kleinfeld disagrees, viewing the injury Plaintiffs assert here as simply *their* "revulsion for [the] Boy Scouts" and "feelings of disagreement" with its beliefs. This assertion betrays a rather skewed view of

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which direction the revulsion actually flows in this case, and to what effect.¹ One only need look at the Boy Scout Oath and Law — the dissent's skepticism concerning the derogatory messages conveyed by parts of those liturgies notwithstanding — to see that requiring plaintiffs to deal with the Scouts in order to use Camp Balboa and the Mission Bay Park Youth Aquatic Center results in an injury which, in fact, is very real.

The offense Plaintiffs suffer comes from having to interact with a group that excludes *them*, on the basis of personal characteristics which that group denigrates and to which it ascribes moral opprobrium. The Boy Scouts Oath and Law contain many uplifting sentiments that contain no implicit criticisms and are in no way exclusionary. But the Boy Scouts also require their members to promise to be "morally straight" — and so exclude gays and lesbians, like the Barnes-Wallaces, from participation in the organization because the Scouts believe that homosexuality is incompatible with *moral* straightness and cleanliness. *See Boy Scouts of*

1. The dissent criticizes plaintiffs for bringing this case "under the guise that their own feelings and disagreements make them feel excluded." The sociological term for the tendency to attribute fault for injuries experienced by members of a subordinated group to the group itself is "blaming the victim." *See, e.g.*, William Ryan, *Blaming the Victim* (Vintage, 1976); *cf. Hernandez v. Ashcroft*, 345 F.3d 824, 836 (9th Cir. 2003) (noting that "lay understandings of [the causes of] domestic violence" are "frequently comprised of myths, misconceptions, and victim blaming attitudes" (internal quotation marks omitted)).

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Am. v. Dale, 530 U.S. 640, 652 (2000) (quoting Scouts' position that "homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed"). The Scouts also exclude atheists and agnostics, like the Breens, on the ground that "no member can develop into the best kind of citizen without recognizing an obligation to God." *Randall v. Orange County Council, Boy Scouts of Am.*, 17 Cal. 4th 736, 742 (1998) (citing the Scouts' expectation that their leaders will convey this position to their members).

So let us be clear about the source of the "disagreement" here: The Scouts exclude people like the Breens and Barnes-Wallaces, because the Scouts believe them to possess characteristics that make them morally unclean and incapable of being the "best kind of citizen." In other words, the reason the Scouts exclude the Breens and Barnes-Wallaces is not simply that they do not have the same beliefs or practice the same life styles; the reason is that, to the Scouts, the Breens and Barnes-Wallaces hold beliefs and practice life styles that are reprehensible and subject to deeply held, adverse moral judgments. To *not* take serious offense from such characterizations would require a better sense of humor than most of us possess.²

2. "I don't care to belong to any club that will have me as a member." Arthur Sheekman, *The Groucho Letters* (1967) (quoting Groucho Marx); see also *Allen v. National Video, Inc.*, 610 F. Supp. 612, 617 (S.D.N.Y. 1985) (paraphrasing same).

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More importantly, there is not merely offense here but injury too. To use Camp Balboa and the Mission Bay Park Youth Aquatic Center, the Plaintiffs must not just *observe* the presence of the Boy Scouts, but also interact with, seek permission from, and, quite significantly, pay fees to, this same organization that believes them inferior in both morals and citizenship. Plaintiffs allege that in order to avoid such a situation, they and their children forgo use of the site, thereby giving up a basic interest that citizens possess in public land — the right to simply enter and enjoy its recreational environment. *See, e.g., Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1396 (9th Cir. 1992). Our case law is quite clear, of course, that avoidance of public land that one would otherwise visit and use is an injury that gives rise to standing. *Buono v. Norton*, 371 F.3d 543, 546-47 (9th Cir. 2004).

The absence of giant crosses or massive Boy Scout emblems in this case, of which the dissent makes much, is simply a 51-foot tall red herring. To return to my historical analogy, suppose that, during the civil rights movement era, a municipality permitted a local White Citizens Council, which opposed desegregation and extension of voting rights to blacks, to operate on public land a recreation center, which African-American families could, for a fee paid to the Council, get permission from the Council to use. Would those families lack an injury-in-fact if they avoided using those facilities in order to avoid this *direct interaction* with an organization whose policy, otherwise, is to exclude and demean them? And would the answer differ depending

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on whether or not the Council erected a billboard on the property endorsing "Segregation Forever"?³

The obviousness of the answer to this question is reflected in the long series of First Amendment cases illustrating that, when plaintiffs are required to choose between either paying a fee to an organization with which they disagree or forgoing an interest to which they are entitled, the existence of an injury-in-fact is simply taken as a given. See, e.g., *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (plaintiff required as a condition of law practice to pay dues to state bar with whose political activities it disagreed); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (plaintiff required as a condition of employment to pay dues to union with which it disagreed). As here, the decisive element in those cases was the direct injury to the plaintiff's interests

3. As this example suggests, Judge Kleinfeld's complaint that it is inappropriate to compare Boy Scout emblems to symbols of white supremacy misses my point entirely: The absence or presence on public land of *symbols* of exclusion, whether racial, religious or otherwise, is *not* the focus of the standing issue in this case. Plaintiffs' injury here comes from the requirement of having to directly interact with, and pay fees to the Boy Scouts — the actual *excluders*, themselves — in order to use this land. And the dissent's representation to the contrary notwithstanding, Plaintiffs' avoidance of this land is not a reaction to what they "imagine the Boy Scouts feel about them." Instead, it is a response to the Scouts' actual policy of excluding gays and atheists, which is a matter of legal record, not bare speculation. See, e.g., *Dale*, 530 U.S. at 652; *Randall*, 17 Cal. 4th at 742 (1998).

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generated in part by the requirement of interaction with a group with which one did not want to associate, not the mere fact of a disagreement with the defendant organization. True, these cases and others like them ultimately concluded that there are circumstances in which mandatory association is permitted and devised limited remedies for those circumstances in which it is not. *See, e.g., Abood*, 431 U.S. at 237-40. But for present purposes, the salient point is that the legal system recognized the *complaint* of the plaintiffs in those cases — that they should not have to associate with and pay fees to an organization with which they disagreed to have access to commonly available benefits — as one which the plaintiffs were entitled to raise in court, and to which they were entitled a judicial answer.

For all these reasons, the dissent's suggestion that our granting standing in this case means that anyone who disagrees with the beliefs of any other group to which the City of San Diego leases property could bring similar litigation is entirely overblown. To succeed on the standing theory the majority adopts, such would-be plaintiffs would have to show (1) that on the property leased to that group by the city there is some site or facility which the individual plaintiffs could have and *would have* visited and used, were it not for (2) that group having an exclusionary policy that *directly* and *personally* affects the plaintiffs, and (3) that use of the property would require interaction with the group, such as paying fees for use of the facility, and perception of its symbols. Cf. *Allen v. Wright*, 468 U.S. 737, 756-57 &

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n.22 (1984). Moreover, even if standing were so established, to prevail in their suit the plaintiffs would still have to prove that the defendant group's adherence to this policy means that the city's leasing it the property violates the state or federal constitution.

I am entirely unconvinced that allowing such cases to be litigated in court will, as the dissent suggests, "undermine free speech and freedom of association." Instead, providing the plaintiffs with their day in court will ensure that when government turns the public's property over to private groups, it does so in accordance with relevant constitutional requirements. We certify the merits issues raised in this case to the California Supreme Court because the question of what the California Constitution requires in this case is one best answered by the state's Supreme Court. What I do not doubt, however, is that Plaintiffs here have demonstrated sufficient standing to raise it.

Accordingly, I concur in the majority order.

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KLEINFELD, Circuit Judge:

I respectfully dissent.

We issued a previous order in this case.¹ I dissented, on the ground that the plaintiffs lacked standing.² The Boy Scouts petitioned for rehearing, and the majority now issues an order with a quite different standing analysis. Without standing, there is no federal jurisdiction, and no authority to certify.

Surprisingly, the majority now bases standing on a theory the majority expressly rejected the last time around. The new theory is that the plaintiffs would like to use the parks but “avoid doing so because they are offended by the Boy Scouts’ exclusion, and publicly expressed disapproval, of lesbians, atheists and agnostics.”³ The theory is that the plaintiffs suffer “emotional harm and the loss of recreational enjoyment”⁴ because they “do not want to view signs posted by the Boy Scouts or interact with the Boy Scouts’ representatives in order to gain access to the facilities.”⁵

1. *Barnes-Wallace v. City of San Diego*, 471 F.3d 1038 (9th Cir. 2006).

2. *Id.* at 1049 (Kleinfeld, J., dissenting).

3. Order certifying question to the Supreme Court of California at 6597, *Barnes-Wallace v. City of San Diego*, No. 04-55732.

4. *Id.* at 6599.

5. *Id.* at 6598.

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Perhaps I need say no more than that the majority expressly rejected this very theory the last time around, and rightly so. Here is what the majority said last time about the theory it adopts this time:

We reject the families' other theories of standing. The Breenes' and the Barnes-Wallaces' purposeful avoidance of the parklands leased by the Boy Scouts as a protest against the Scouts' exclusionary policies is not a sufficient injury. We have held that people can suffer a direct injury from the need to avoid large religious displays, such as giant crosses or lifesize biblical scenes. See, e.g., *Buono*, 371 F.3d at 549 (five to eight-foot-tall cross); *SCSC*, 93 F.3d at 619 (fifty-one-foot-tall cross); *Ellis*, 990 F.2d at 1520 (thirty-six-foot and forty-three-foot-tall crosses); *Kreisner v. City of San Diego*, 1 F.3d 775, 777 (9th Cir. 1993) (ten by fourteen-foot displays containing life-size statuary of biblical scenes). But there are no displays in either Camp Balboa or the Aquatic Center that would be so overwhelmingly offensive that families who do not share the Scouts' religious views must avoid them. See *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (requiring the plaintiffs to show a personal injury suffered

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"as a consequence of the alleged constitutional error") (emphasis omitted).⁶

That was correct and that should be the end of the case. To assist the reader, I will speak a little more extensively than the majority did last time on why the psychological theory is mistaken, and the cases distinguished last time were correctly distinguished.

The overarching authority for this standing issue is the Supreme Court decision in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*.⁷ The Court granted certiorari in that case to reject "the unusually broad and novel view of standing" that the lower court had applied in Establishment Clause cases.⁸ In *Valley Forge*, advocacy groups challenged a government decision to give excess government real estate for free to the Assemblies of God to operate a Christian college. The Court expressly rejected the psychological injury theory argued in that case and ours. The Court held that "psychological" injury caused by "observation" of "conduct with which one disagrees" is "not an injury sufficient to confer standing under Art. III."⁹

6. *Barnes-Wallace*, 471 F.3d at 1045-46.

7. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

8. *Id.* at 470.

9. *Id.* at 485.

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They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.¹⁰

It is not enough, under controlling authority, that plaintiffs have an interest in the conduct they challenge. For them to have standing, they need a "legally protected interest."¹¹ Under *Valley Forge*, "psychological consequence,"¹² even when strongly felt, is not what *Lujan v. Defenders of Wildlife* calls a "legally protected interest"¹³ and "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy."¹⁴

The majority now distinguishes *Valley Forge* on the theory that the plaintiffs in that case did not want to

10. *Id.*

11. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

12. *Valley Forge*, 454 U.S. at 485.

13. *Lujan*, 504 U.S. at 560.

14. *Valley Forge*, 454 U.S. at 486.

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use the land and the plaintiffs in this case do.¹⁵ The *ratio decidendi* of *Valley Forge* does not support this distinction. *Valley Forge* holds that “psychological” injury caused by “observation” of “conduct with which one disagrees” is not a concrete injury to a legally protected interest sufficient to confer standing, and that is what the plaintiffs allege. Thus being there and seeing the offending conduct does not confer standing.

In *Valley Forge*, the Court saw no significance to the fact that one of the advocacy groups objecting to this giveaway of federal land near Philadelphia had members who lived in Pennsylvania.¹⁶ But suppose that the distinction would make a difference, as when environmental advocacy groups have standing or not depending on whether they have members who use the land affected by the proposed federal action.¹⁷ There still needs to be a concrete injury to a legally protected interest, and in our case there is nothing but avoidance of a place because of people there who hold different views.

The authorities the majority relies on today (having distinguished them last time) are our gigantic cross

15. Order certifying question to the Supreme Court of California at 6599-6600, *Barnes-Wallace v. City of San Diego*, No. 04-55732.

16. *Valley Forge*, 454 U.S. at 487 n.23.

17. See *Lujan*, 504 U.S. at 560.

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cases, primarily *Buono v. Norton*¹⁸ and *Ellis v. City of La Mesa*.¹⁹ *Buono* applied *Separation of Church & State Committee v. City of Eugene*,²⁰ which had held that a 51-foot-tall neon-illuminated cross on the crest of a hill in a city park violated the Establishment Clause.²¹ In *Buono* the cross in Mojave National Preserve was five to eight feet tall on a prominent rock outcropping rising 15 to 20 feet above grade. It appeared “likely that the Sunrise Rock cross will project a message of government endorsement to a reasonable observer” of a particular religious belief.²² The plaintiff had standing because he regularly visited the preserve and took an inconvenient road to avoid viewing the prominent cross on government property.²³

Buono holds that the “inhibition” from using public land “as a consequence of the alleged constitutional error” created by the cross goes beyond a mere psychological injury. This holding has boundaries, among them the facts of *Buono* and the holding in *Valley Forge*.

18. *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004).

19. *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993).

20. *Separation of Church & State Committee v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996).

21. *Id.* at 618.

22. *Buono*, 371 F.3d at 549.

23. *Id.* at 547.

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Buono distinguishes “the psychological consequence presumably produced by observation of conduct with which it disagrees,” and a psychological consequence is all plaintiffs establish in this case.²⁴

In *Ellis*, there were three crosses, one 36 feet high on top of a mountain, one 43 feet high in a city park, and a picture of the mountaintop cross on the city insignia.²⁵ The plaintiffs avoided the locations, missed the spectacular view from the mountaintop, and one claimed that he declined to invite business clients to the city because the cross offended them. We held that the plaintiffs who would have visited the public areas but for the crosses had standing because their access to public property was interfered with by the crosses. The majority applies the same theory here. Applying these cases, though, to a case where there is no gigantic cross, is an unjustified extension of their holdings.

The majority was correct the last time, when it distinguished the gigantic cross cases. Previously, it held that “[t]he Bredens’ and the Barnes-Wallaces’ purposeful avoidance of the parklands leased by the Boy Scouts as a protest against the Scouts’ exclusionary policies is not a sufficient injury . . . [because] there are no displays in either Camp Balboa or the Aquatic Center that would be so overwhelmingly offensive that families who do not

24. *Buono*, 371 F.3d at 547 (quoting *Valley Forge*, 454 U.S. at 485).

25. *Ellis*, 990 F.2d at 1520.

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share the Scouts' religious views must avoid them." I agree.

In our gigantic cross cases, the government maintained what amounted to a shrine for a particular religion on public land. Since time immemorial, shrines have been erected on hills and mountaintops.²⁶ A huge cross on a hill or mountaintop would appear to a reasonable objective observer to be a shrine. People not sharing the religious views represented by the cross become visitors to another religion's shrine. On public lands, we are all owners, none of us are mere guests. Even if the Boy Scout emblem were 51 feet tall, illuminated by neon, and at the crest of a hill (none of which is true), no reasonable observer would think that the Boy Scout emblem created a shrine to a major religion or sexual preference. A gigantic cross on a mountaintop carries religious significance that a herd of 11 year old boys camping out and swimming does not.

Unlike a cross, neither a Boy Scout, nor the Boy Scout emblem (an eagle with a shield on a fleur-de-lis), nor a sign saying "Boy Scouts," is the central symbol of any religion or sexual preference. One would have no idea that the Boy Scouts even had any views about religion or sex without doing research. And even if one did, one would, as the petition for rehearing demonstrates, learn that sex and religion are but an incidental part of scouting. If one reads the Boy Scout Handbook to find out whether the Boy Scouts are

26. See, e.g., 1 Samuel 9:9-13; 1 Kings 3:2.

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primarily oriented around sexual and religious teachings, one will be disappointed to find that there are more pages about knot tying than sex and religion combined, and that most of what Boy Scouts learn about and do involves camping, boating, hiking, swimming, and charitable activities.

Here is the Boy Scout oath that the Barnes-Wallaces say makes them "feel degraded."

Scout Oath or Promise

On my honor I will do my best
To do my duty to God and my country
and to obey the Scout Law;
To help other people at all times;
To keep myself physically strong,
mentally awake, and morally straight.

Those who disagree with religion of any sort, patriotism, altruism, physical fitness, mental alertness, or honesty as virtues would not want to take this oath, but no one has to take the oath or know what it says to use the park. Here is the Boy Scout Law that generations of Scouts have been required to memorize, and that the Breens swear makes them feel "disturbed" and "offended,"

Scout Law

A Scout is trustworthy, loyal,
helpful, friendly, courteous, kind,
obedient, cheerful, thrifty, brave,
clean, and reverent.

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One who rejects any of these as virtues, not just reverence, would not want to follow the Boy Scout Law, but no one has to honor or even know of the oath in order to use the park. Many generations of Boy Scouts have committed the whole oath to memory, as they must to get their Tenderfoot badge. Without memorizing the Scout Law or looking it up, one would not even know that it included a non-sectarian reference to religion. By contrast, a gigantic cross on a mountaintop requires no research to let the visitor know that he is visiting a Christian shrine.

There is a distinction between a prominent display of an unambiguous religious symbol on public land and groups with myriad viewpoints working with government to facilitate public use of lands. San Diego, like many municipalities, leases property to many non-profit groups: San Diego Calvary Korean Church, Point Loma Community Presbyterian Church, the Jewish Community Center, the Vietnamese Federation, the Black Police Officers Association, and ElderHelp. No doubt people can be found in San Diego who do not like Koreans, Presbyterians, Jews, Vietnamese, Blacks, and old people, and who disagree with the beliefs people in these groups share. Their feelings of disagreement or dislike should not be treated as the "concrete injury" that is "an invasion of a legally protected interest" required for standing.²⁷

27. Judge Berzon almost concedes that her "comparison to the Jim Crow South may seem greatly overblown." Indeed it does. Comparing the feelings of lesbians or atheists in San
(Cont'd)

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(Cont'd)

Francisco who object to the Boy Scouts managing a municipal facility, even though they have full, open, and totally nondiscriminatory access, to the treatment of black people in the Jim Crow South is worse than overblown. It is obscene.

It is beyond me how anyone old enough to recall when they separated us in Delaware on the train from New York to Washington, D.C., can use the Jim Crow laws as an analogy to the Boy Scouts managing facilities in Balboa Park. Black people were not allowed access, generally south of the Delaware-Pennsylvania state line, to diners, restaurants, water fountains, the front of the bus, and the front of railroad cars until the civil rights movement awakened America to the injustice of racial exclusion in the 1950's and 1960's. Gays, lesbians and atheists have access identical to everyone else's in the public spaces at issue in this case. They just don't want to use it because of their offended feelings.

Judge Berzon concedes in footnote 3 that "[t]he absence or presence on public land of *symbols* of exclusion, whether racial, religious or otherwise, is *not* the focus of the standing issue in this case," yet the only standing case she cites in her concurrence, *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004), turns precisely on the presence of a cross on public land. Judge Berzon's other case citations, *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1396 (9th Cir. 1992), *Keller v. State Bar of California*, 496 U.S. 1 (1990), *Abood v. Detroit Board of Education*, 431 U.S. 209, 240 (1977), and *Allen v. Wright*, 468 U.S. 737, 756-57 and n.22 (1984), are also ill-fitting, as any intrepid scholar will discover.

It is crucial to the majority's argument to call the Boy Scouts "the excluders," but at Balboa Park, they do not exclude.

(Cont'd)

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There is a distinction important to our liberties between having a legally protected interest and having an interest in not being offended. Some people may feel "degraded" or "offended" because of the Boy Scouts' positions on reverence and sexuality but so long as their access is unimpaired, the feeling is no stronger a basis for standing than the feelings others may have about atheists or lesbians managing the facility. By treating the Barnes-Wallaces and Brends revulsion for Boy Scouts and consequent avoidance of a place the Boy Scouts manage as conferring standing, we extend standing to a claim that precedent does not support. And we assist in a campaign to destroy by litigation an association of people because of their viewpoints. A feeling of revulsion for others who have different beliefs, so strong that one feels degraded or excluded if they are present, does not confer standing.

Granting standing to the Barnes-Wallaces and the Brends undermines freedom of speech and freedom of association. The Boy Scouts are entitled to gather

(Cont'd)

The exclusion, to confer standing, must be from a facility to which one desires access. The Presbyterian Church, would, I should think, exclude me from employment as a minister, because I am Jewish, but if they managed a recreational facility open to all without discrimination as the Boy Scouts do, their ministry exclusion would not give me standing to challenge their park management contract. Exclusion from something else entirely, employment as a minister, does not confer standing to challenge any relationship the government has with the organization.

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together freely and reinforce the views they share. The Barnes-Wallaces and the Breens can use the facilities that the Boy Scouts manage without agreeing to the Boy Scouts' views, and without the quiet and respectful politeness we all exercise in the presence of another religion's shrines.

One virtue not in the Boy Scout law, doubtless because in a free society it is taken for granted, is tolerance. The Boy Scouts must and do display tolerance for gay, lesbian, atheist, and agnostic users of the facilities that they manage for the city. A free country requires that groups with differing views, such as the plaintiffs and the Boy Scouts, nevertheless have to display tolerance for each other. Granting standing to one because the presence of the other revolts them, under the guise that their own feelings and disagreements make them feel excluded, threatens all our liberties.

**APPENDIX C — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
FILED DECEMBER 26, 2006**

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 04-55732

D.C. No. CV-00-01726-NAJ/AJB
Southern District of California, San Diego

MITCHELL BARNES-WALLACE; et al.,

Plaintiffs - Appellees,

v.

CITY OF SAN DIEGO,

Defendant,

And

BOY SCOUTS OF AMERICA –
DESERT PACIFIC COUNCIL,

Defendant - Appellant.

Appendix C

No. 04-56167

D.C. No. CV-00-01726-NAJ/AJB
Southern District of California, San Diego

MITCHELL BARNES-WALLACE; et al.,

Plaintiffs - Appellants,

V.

CITY OF SAN DIEGO; et al.,

Defendants - Appellees.

ORDER.

Before: CANBY, KLEINFELD, and BERZON, Circuit Judges.

On December 18, 2006, we certified questions in this case to the Supreme Court of California. Our certification order and the briefs of the parties were dispatched to that Court on the same day.

On December 21, 2006, a judge of this court filed a notice that may lead to en banc review of our certification order. In light of that fact, we request the California Supreme Court to delay consideration of our certification order until we notify it of the conclusion of any potential en banc activity affecting the certification order.

Appendix C

The Clerk of our court is directed immediately to notify the California Supreme Court of this order, and promptly to dispatch to that Court a copy of this order.

**APPENDIX D — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
FILED DECEMBER 18, 2006**

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 04-55732

D.C. No.
CV-00-01726-
NAJ/AJB

**MITCHELL BARNES-WALLACE;
MAXWELL BREEN,**

Plaintiffs-Appellees,

v.

CITY OF SAN DIEGO,

Defendant,

and

**BOY SCOUTS OF AMERICA —
DESERT PACIFIC COUNCIL,**

Defendant-Appellant.

Appendix D

No. 04-56167

D.C. No.
CV-00-01726-
NAJ/AJB

MITCHELL BARNES-WALLACE; MAXWELL
BREEN; LORI BARNES-WALLACE, GUARDIAN
AD LITEM; LYNN BARNES-WALLACE, GUARDIAN
AD LITEM; MICHAEL BREEN, GUARDIAN AD
LITEM; VALERIE BREEN, GUARDIAN AD LITEM,

Plaintiffs-Appellants,

v.

CITY OF SAN DIEGO; BOY SCOUTS OF AMERICA
— DESERT PACIFIC COUNCIL,

Defendants-Appellees.

**ORDER CERTIFYING QUESTIONS TO THE
SUPREME COURT OF CALIFORNIA**

Filed December 18, 2006

Before: William C. Canby, Jr., Andrew J. Kleinfeld,
and Marsha S. Berzon, Circuit Judges.

Order; Dissent by Judge Kleinfeld

ORDER

We respectfully request the California Supreme Court to exercise its discretion and decide the certified questions presented below. See Cal. R. Ct. 29.8. The

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resolution of any one of these questions could determine the outcome of this appeal and no controlling California precedent exists. *See id.* We are aware of the California Supreme Court's demanding caseload and recognize that our request adds to that load. But we feel compelled to request certification because this case raises difficult questions of state constitutional law with potentially broad implications for California citizens' civil and religious liberties. Considerations of comity and federalism favor the resolution of such questions by the State's highest court rather than this court.

I. Questions Certified

The Desert Pacific Council, a nonprofit corporation chartered by the Boy Scouts of America, leases land from the City of San Diego in Balboa Park and Mission Bay Park. The Council pays no rent for the Mission Bay property and \$1 per year in rent for the Balboa Park property. In return, the Council operates Balboa Park's campground and Mission Bay Park's Youth Aquatic Center. The campground and the Aquatic Center are public facilities, but the Council maintains its headquarters on the campground, and its members extensively use both facilities. The Boy Scouts of America — and in turn the Council — prohibit atheists, agnostics, and homosexuals from being members or volunteers and requires members to affirm a belief in God.

The plaintiffs are users of the two Parks who are, respectively, lesbians and agnostics. They would use the

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land or facilities leased by the Desert Pacific Council but for the Council's and Boy Scouts' discriminatory policies.

We certify to the California Supreme Court the following questions:

1. Do the leases interfere with the free exercise and enjoyment of religion by granting preference for a religious organization in violation of the No Preference Clause in article I, section 4 of the California Constitution?
2. Are the leases "aid" for purposes of the No Aid Clause of article XVI, section 5 of the California Constitution?
3. If the leases are aid, are they benefiting a "creed" or "sectarian purpose" in violation of the No Aid Clause?

The California Supreme Court is not bound by this court's presentation of the questions. We will accept a reformulation of the questions and will accept the Supreme Court's decision. To aid the Supreme Court in deciding whether to accept the certification, we provide the following statement of facts, jurisdictional analysis, and explanation.

*Appendix D***II. Statement of Facts**

The Desert Pacific Council is a nonprofit corporation chartered by The Boy Scouts of America to administer Scouting programs in the San Diego area. The Council must adhere to the Boy Scouts' policies and rules. These rules include a prohibition against allowing youths or adults who are atheists, agnostics, or homosexuals to be members or volunteers. *Cf. Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (holding that the Boy Scouts has a constitutional right to exclude homosexuals). The Boy Scouts maintains that agnosticism, atheism, and homosexuality are inconsistent with its goals and with the obligations of its members. See *Randall v. Orange County Council, Boy Scouts of Am.*, 17 Cal. 4th 736, 742 (1998) (reciting that, in defending its right to exclude atheists, the Boy Scouts introduced "evidence intended to establish that requiring the inclusion of nonbelievers . . . would interfere with the organization's efforts to convey its religious message"). The organization's mission is "to prepare young people to make ethical choices over their lifetimes by instilling in them the values of the Scout Oath and Law." [ER 2003 ¶ 162.] As part of the Scout Oath, each member and volunteer must pledge to "do my best . . . [t]o do my duty to God and my country" and to remain "morally straight." [*Id.* 2005 ¶ 176.] Duty to God is placed first in the Oath because it is "the most important of all Scouting values." [*Id.* 2004 ¶ 170.] Members also must agree to uphold the "Scout Law," which provides that Scouts are "Reverent" and "Clean." [*Id.* 2005 ¶ 176-77.] Membership and leadership

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applications contain a “Declaration of Religious Principle,” which explains that “no member can grow into the best kind of citizen without recognizing an obligation to God.” [*Id.* 1535.] The Boy Scouts instructs leaders to “be positive in their religious influence and . . . [to] encourage Scouts to earn the religious emblem of their faith.” [*Id.* 1527.]

The plaintiffs Barnes-Wallaces are a lesbian couple and the plaintiffs Breens are agnostics. Because of their sexual and religious orientations, they cannot be Boy Scout volunteers. Both couples have sons old enough to join the Boy Scouts, and they would like their sons to use the leased facilities, but the parents refuse to give the approval required for membership. As part of the membership application, parents must promise to assist their sons “in observing the policies of the Boy Scouts of America . . . [to] serve as his adult partner and participate in all meetings and approve his advancement.” [*Id.* 1533.] The application also includes the Scout Law and the Declaration of Religious Principle. The Barnes-Wallaces and the Breens believe the Boy Scouts’ policies are discriminatory, and they refuse to condone such practices by allowing their children to join.

In the plaintiffs’ hometown of San Diego, the Desert Pacific Council leases, occupies, and operates portions of two popular city parks extensively used by the plaintiff families. The Council leases from the City sixteen acres in Balboa Park known as Camp Balboa. Camp Balboa offers a “unique” urban camping

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opportunity in the "heart of the City." [*Id.* 1966 ¶ 7.] The site includes campgrounds, a swimming pool, an amphitheater, a program lodge, a picnic area, a ham radio room, restrooms and showers, and a camp ranger office. Under the original lease, the Council paid \$1 per year in rent. In 2002 the parties entered into a new twenty-five-year lease, which requires the Desert Pacific Council to pay \$1 in annual rent and a \$2,500 annual administration fee, and to expend at least \$1.7 million for capital improvements over seven years.

The Desert Pacific Council makes exclusive use of portions of Balboa Park for its own benefit. The Council has its headquarters on park property. From this facility it oversees its \$3.7 million budget, manages its thirty employees, and processes applications for membership and leadership positions. The Council has a print shop on park land that it uses to print literature for its members. These portions of the park are unavailable for public use. The Council also controls Camp Balboa's reservations. It pencils in reservations as far in advance as it wishes and then advertises the pre-reserved times to its members. The Council can declare the camp "closed," determine how many people are going to attend the camps, and then open up only the unreserved facilities to the public.¹

1. For example, the Desert Pacific Council advertised camping dates for all of 2002 in its Winter 2001 newsletter. In October 2002, it had already reserved the campsites for its 2003 summer camp. The 2001 reservation books show that the camp was closed during the Desert Pacific Council's spring and
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The Council also leases land on Fiesta Island in Mission Bay Park. In 1987, the City entered into a twenty-five-year, rent-free lease with the Desert Pacific Council for one-half acre of waterfront property on Fiesta Island. The City entered into this lease after the Desert Pacific Council approached it about building and operating an aquatic center on the island. The Council was awarded the lease on the condition that it expend \$1.5 million to build the Youth Aquatic Center. The Council built and now operates the Aquatic Center, which offers boating, sailing, canoeing, and kayaking to San Diego youth.

Unlike Camp Balboa, the Aquatic Center has a formal first-come, first-served policy, but the policy has exceptions for Scout members. The Desert Pacific Council is permitted to reserve up to 75% of the facilities seven days in advance. The Council also hosts a members-only camp for four weeks each summer. The reservation books during camp say "YAC Closed for Summer Camp." The public cannot use the Aquatic Center during summer camp for water-based activities,

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summer camps. Diagonal slashes or an "x" covered the reservation books for these periods. The Council also reserved the entire campground for several days in February, March, and May 2001, and from December 31, 2001 to January 5, 2002. At one time the Desert Pacific Council informed non-Scout youth groups that they could make reservations not more than three months in advance and that the reservations would be accepted only if they did not conflict with "other scheduled Scouting functions."

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but can reserve dormitories or other facilities the Scouts are not using.

The plaintiff families brought this action against the City of San Diego, the Boy Scouts, and the Desert Pacific Council, alleging that leasing public land to an organization that excludes persons because of their religious and sexual orientations violates the federal Establishment Clause, the California Constitution's No Preference² and No Aid³ Clauses, the Federal and State Equal Protection Clauses, the San Diego Human Dignity Ordinance, and state contract law. The district court

2. This Clause provides:

Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting the establishment of religion.

Cal. Const. art. I, sec. 4.

3. This Clause states:

Neither the legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose.

Cal. Const. art. XVI, sec. 5.

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found the families had standing as municipal taxpayers and then allowed them to file an amended complaint. Both parties sought summary judgment. The court found that the leases violated the federal Establishment Clause and the California No Aid and No Preference Clauses and granted summary judgment in the families' favor. *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259, 1276-80 (S.D. Cal. 2003). In the amended final judgment, the court enjoined the Balboa Park and Fiesta Island leases. The City then notified the Council that under the terms of the 2002 Balboa Park lease, the term tenancy was terminated and converted to a month-to-month tenancy. The families have since settled with the City. The Scout defendants appealed the district court's ruling.

III. Jurisdictional Analysis

Before proceeding further, we must satisfy ourselves that we have jurisdiction over this appeal. We have statutory jurisdiction over the appeal under 28 U.S.C. § 1291, but the parties have presented challenges to the existence of a case or controversy that is essential to our constitutional jurisdiction under Article III. See *Harrison W. Corp. v. United States*, 792 F.2d 1391, 1392 (9th Cir. 1986). We address these issues as threshold matters.

1. Mootness

The plaintiffs argue that the appeal is moot as to the Balboa Park lease because the City terminated the

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lease after the district court's final judgment. The appeal is not moot because the Desert Pacific Council still has "a legally cognizable interest for which the courts can grant a remedy." *Alaska Ctr. for Env't v. U.S. Forest Service*, 189 F.3d 851, 854 (9th Cir. 1999). The City did not terminate the Desert Pacific Council's tenancy, but rather converted it to a month-to-month, hold-over tenancy. [ER 804.] The Council still occupies Camp Balboa, and the permissibility of its tenancy remains at issue in this appeal. Moreover, the City's notice terminating the lease indicated that, if the district court's judgment is reversed, the termination notice will be of no effect. The controversy with regard to the Balboa Park lease is not moot.

2. Standing

The Boy Scouts challenges the standing of plaintiffs to bring this action. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (explaining that standing is a component of the case-or-controversy requirement). Because the case was decided on summary judgment in the district court, the plaintiffs had the burden of showing by uncontroverted facts that they had standing to challenge the leases. *See id.* at 561. We conclude that the plaintiffs have sustained that burden, but we base standing on a different ground from that adopted by the district court.

The Barnes-Wallaces and the Breens have standing to pursue their claims because uncontroverted evidence shows that they suffered injuries in fact traceable to

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the Scout defendants' conduct that a favorable decision is likely to redress. *See Lujan*, 504 U.S. at 560-61. The Barnes-Wallaces and the Breens submitted declarations asserting, without contradiction by the Scout defendants, that they used the parks and would like to use the facilities of the Scouts. They claim to have inferior access because their sexual orientation or agnostic beliefs precludes their becoming members. Such an "inability to unreservedly use public land suffices as [an] injury-in-fact." *Buono v. Norton*, 371 F.3d 543, 547 (9th Cir. 2004); *see Separation of Church & State Committee v. City of Eugene*, 93 F.3d 617, 619 n.2 (9th Cir. 1996) (per curiam) (finding standing because plaintiffs "alleged that the cross prevented them from freely using the area on and around" the location of the cross); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993) (explaining that "standing may be based on finding that the plaintiff has been injured due to his or her not being able to freely use public areas").

We conclude that no rational trier of fact could find that the plaintiffs had access to the leased facilities that was equal to that enjoyed by Scout members. Even construing the facts favorably for the Scout defendants, the evidence shows they have preferential — and at times exclusive — use of the leased parklands.⁴

The Scout defendants contend that the plaintiffs would have been able to use the Camp Balboa facilities

4. For a detailed description of the Scouts' preferential use of the leased parklands, see *supra* pp. 19469-70.

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if they had applied. There are two overflow campsites, the Scouts state, and “[t]here's always someplace in Camp Balboa to . . . fit somebody in.” [SER 624-25.] They claim its members “never use 100% of the available space at Camp Balboa” and that other facilities, such as the swimming pool, can be used during their camps. The Boy Scouts’ argument mistakenly assumes that access to Camp Balboa is equal because the campground is not closed for the Scouts’ exclusive use. The public’s access to the parkland is unequal because it is not on as favorable terms as that of the Boy Scouts.

The families also have unequal access to the Fiesta Island Aquatic Center. Again, the Boy Scouts mistakenly assumes that the public has equal access to the Aquatic Center because it is not completely closed to nonmembers. The Desert Pacific Council’s control of the reservations allows it to gain exclusive access to the most sought-after facilities.

Neither the Breens nor the Barnes-Wallaces tried to gain access to Camp Balboa or the Aquatic Center, but this fact does not preclude standing. The families knew they would be subject to unequal or discriminatory treatment, and they did not have to subject themselves to such treatment to incur an injury. See *Ne. FL Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *Bouman v. Block*, 940 F.2d 1211, 1221 (9th Cir. 1991). Their injury was the denial of equal treatment that resulted from a

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combination of the Boy Scouts' exclusion of atheists, agnostics, and homosexuals and the Scouts' preferential use of Camp Balboa and the Aquatic Center. *See Ne. Fl. Chapter*, 508 U.S. at 666 (explaining that the injury is "the denial of equal treatment resulting from the imposition of the barrier"). Accordingly, they were not required to attempt to use the portions of the park the Desert Pacific Council exclusively occupies or to make a reservation during Scout camp. *See Int'l Broth. of Teamsters v. United States*, 431 U.S. 324, 365 (1977) (stating that a discriminatory employment policy can deter "those who are aware of it" from applying for jobs).

3. The Families' Alternative Theories of Standing

We reject the families' other theories of standing. The Breen's' and the Barnes-Wallaces' purposeful avoidance of the parklands leased by the Boy Scouts as a protest against the Scouts' exclusionary policies is not a sufficient injury. We have held that people can suffer a direct injury from the need to avoid large religious displays, such as giant crosses or life-size biblical scenes. *See, e.g., Buona*, 371 F.3d at 549 (five to eight-foot-tall cross); *SCSC*, 93 F.3d at 619 (fifty-one-foot-tall cross); *Ellis*, 990 F.2d at 1520 (thirty-six-foot and forty-three-foot-tall crosses); *Kreisner v. City of San Diego*, 1 F.3d 775, 777 (9th Cir. 1993) (ten by fourteen-foot displays containing life-size statuary of biblical scenes). But there are no displays in either Camp Balboa or the Aquatic Center that would be so overwhelmingly offensive that

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families who do not share the Scouts' religious views must avoid them. See *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982) (requiring the plaintiffs to show a personal injury suffered "as a consequence of the alleged constitutional error") (emphasis omitted).

Nor have the families suffered a direct injury caused by the requirement that they pay a fee to the Desert Pacific Council to use Camp Balboa or Fiesta Island. It is undisputed that user fees are deposited into the Council's general operating fund and therefore may be used for purposes other than the administration and upkeep of the parklands. Nonetheless, the families' injury is "conjectural or hypothetical" because they never paid the fee to the Boy Scouts. *Lujan*, 504 U.S. at 560 (citation omitted). Moreover, there is no showing that the fee conveys a net benefit to the Boy Scouts; on the contrary, the costs of maintaining the facilities exceed the user fees.

Finally, we disagree with the district court and conclude that the families do not have standing as municipal taxpayers because they have not suffered a "direct dollars-and-cents injury." *Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429, 434 (1952). The families characterize the leases as tax expenditures, but the Supreme Court recently held that "state taxpayers have no standing under Article III to challenge . . . state . . . spending decisions simply by virtue of their status as taxpayers." *DaimlerChrysler Corp. v. Cuno*, 126

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S. Ct. 1854, 1864 (2006).⁵ The Court reasoned that the taxpayers lacked standing to challenge a state tax break, in part because it was unclear whether the tax breaks would “deplete the treasury” and thus cause the taxpayers to suffer an “actual or imminent” injury. *Id.* at 1862 (internal quotations omitted). This rationale applies equally to the municipal taxpayer challenge in this case. *Cammack v. Waihee*, 932 F.2d 765, 770 (9th Cir. 1991). The families’ injury is not actual or imminent because it is unclear whether San Diego is expending tax dollars to support the leased property.

The leases are more reasonably characterized as a potential loss of municipal revenues, but even this loss is not particularized enough to create standing. There is no evidence that, if the leases were invalidated, the City would use the land to generate revenue. See *id.* at 1862 (finding the plaintiff taxpayers’ alleged injury too conjectural because it depended on legislators’ responses to the tax breaks). The City’s Director of Real Estate testified that “[t]he City would likely seek another lessee to operate a recreational facility . . . under similar terms and conditions in the existing . . . lease . . . [because the] City Council has never had a policy of using the . . . property in a manner that maximizes the revenue that potentially could be generated by this site.” [SER 4 ¶ 12.] Thus, the families have not suffered an injury to their pocketbook, as is necessary for taxpayer standing.

5. The district court did not have the benefit of *DaimlerChrysler* at the time it ruled that the plaintiffs had taxpayer standing.

*Appendix D***IV. Explanation of Certification****1. The Need to Avoid Federal Constitutional Questions**

We are bound to resolve the families' state constitutional claims before reaching their federal constitutional challenges. *See Kuba v. 1-A Agric. Assoc.*, 387 F.3d 850, 856 (9th Cir. 2004). If the California Constitution provides an independent basis for relief, then there is "no need for decision of the federal issue." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 295 (1982). Yet any interpretation by this court of the State's constitutional clauses, unlike an interpretation by the California Supreme Court, cannot be authoritative. *See Bartoni-Corsi Produce, Inc. v. Wells Fargo Bank, N.A.*, 130 F.3d 857, 861 (9th Cir. 1997).

2. The Need for Certification

We certify three issues to the California Supreme Court because they require interpretation of the state constitution's religion clauses beyond that found in state or federal cases. These clauses affect the delicate relationship between the government and religion, and any interpretation of these clauses has significant public policy ramifications.

a. The No Preference Clause

The No Preference Clause states in part that "[f]ree exercise and enjoyment of religion without

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discrimination or preference are guaranteed." Cal. Const. art. 1 § 4. The California Supreme Court "has never had occasion to definitively construe" this clause. *E. Bay Asian Local Dev. Corp. v. California*, 24 Cal. 4th 693, 719 (2000). Having not yet been faced with a case that requires it "to declare the scope and proper interpretation" of the clause, it has found no necessity to set the boundaries of the Clause. See *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 32 Cal. 4th 527, 562 (2004). We therefore cannot accurately estimate from existing California Supreme Court cases how that Court would apply the No Preference Clause to the case before us. Nor can we with confidence look to federal caselaw interpreting the federal Free Exercise or Establishment Clauses, because those provisions are narrower than California's clause. See *Sands v. Morongo Unified Sch. Dist.* 53 Cal. 3d 863, 910 (1991) (Mosk, J., concurring) (stating that the No Preference Clause "is without parallel in the federal Constitution"); *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1395 (9th Cir. 1994) (noting that the California Constitution "prohibits any appearance that the government has allied itself with one specific religion" and that California courts have interpreted the No Preference Clause "as being broader than the Establishment Clause of the First Amendment").

Although state intermediate appellate courts have construed the No Preference Clause, this case's unique facts would require us to go beyond these decisions. See, e.g., *Woodland Hills Homeowners Org. v. Los*

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Angeles Cnty. Coll. Dist., 218 Cal. App. 3d 79, 93-95 (1990); *Okrand v. City of Los Angeles*, 207 Cal. App. 3d 566, 571-72 (1989); *Bennett v. Livermore Unified Sch. Dist.*, 193 Cal. App. 3d 1012, 1016 (1987); *Feminist Women's Health Ctr., Inc. v. Philibosian*, 157 Cal. App. 3d 1076, 1092 (1984). For example, the families challenge the process by which the leases were obtained, but no California court has identified the perspective from which we should scrutinize these processes to determine whether there has been a forbidden preference. The United States Supreme Court adopts the perspective of a reasonable observer when determining Establishment Clause questions, see *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 635 (1989) (O'Connor, J., concurring in part and concurring in the judgment), but at least one Justice of the California Supreme Court has urged that courts interpreting the No Preference Clause "view the issue from the perspective of the minority," see *Sands*, 53 Cal. 3d at 915 (Arabian, J., concurring). Thus, we seek certification so that the California Supreme Court, rather than this federal court, can chart the proper course through these unresolved areas.

b. The No Aid Clause

No controlling precedent exists in regard to the No Aid Clause either. This Clause prohibits the City from "mak[ing] an appropriation, or pay[ing] from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose."

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Cal. Const. art. XVI § 5. To assess whether the leases violate the No Aid Clause, we must determine whether the leases are aid and, if so, whether the City supports a creed or sectarian purpose by granting the aid to the Boy Scouts. The California Supreme Court has not been called upon to define "aid" in a manner that applies to the circumstances of this case. Nor has it been required to establish what is a "creed" or "sectarian purpose" to which aid cannot be given.

The facts of this case also require us to go beyond the framework set forth in our own decision of *Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002) (en banc), for interpreting the No Aid Clause. *Paulson* concerned a No Aid Clause challenge to a municipal government's sale of public land containing a cross to a sectarian organization. *Paulson* concluded that the No Aid Clause "prohibits the government from (1) granting a benefit in any form (2) to any sectarian purpose (3) regardless of the government's secular purpose (4) unless the benefit is properly characterized as indirect, remote, or incidental." *Id.* at 1131. Whether the City granted a benefit to the Scout defendants for the advancement of a creed or sectarian purpose is a very different and more challenging question than that presented in *Paulson*. Resolution of this issue would require expanding our interpretation of California cases. An expansion or contraction of the definitions of "aid," "creed," or "sectarian purpose" could have a substantial impact upon Californians' liberties. We are reluctant to embark on a refinement of the meaning of

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those terms without the authoritative assistance of the California Supreme Court. We thus ask that Court to exercise its discretion and decide whether the leases are aid and whether this aid benefits a creed or sectarian purpose.

V. Administrative Information

The names and addresses of counsel for Lori, Lynn, and Mitchell Barnes-Wallace and Michael, Valerie, and Maxwell Breen are:

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As required by California Rules of Court 29.8(c) and (d), the Clerk of this Court shall submit copies of all relevant briefs and an original and ten (10) copies of this Order to the Supreme Court of California with a certificate of service on the parties.

VI. Stay and Withdrawal from Submission

All further proceedings in this case in this court are stayed pending final action by the California Supreme Court.

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This case is withdrawn from submission until further order of this court. The parties shall notify the Clerk of this Court within one week after the California Supreme Court accepts or rejects certification, and again within one week if that Court renders an opinion.

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KLEINFELD, Circuit Judge:

I respectfully dissent from the portion of the order concluding that the plaintiffs have standing under Article III. Because the plaintiffs lack standing, the case should be dismissed. However, assuming that there is standing, I concur in the portions of the order certifying questions to the Supreme Court of California.

The reason that the plaintiffs lack standing to sue the City and the Boy Scouts is that their only claimed harm from the Boy Scouts' religiosity is that it offends them. Neither they nor their sons have ever sought to join the Boy Scouts or use the facilities managed by the Boy Scouts. Although the plaintiffs are offended that, at some times of the year, a lot of (presumably reverent) Boy Scouts will be there, plaintiffs do not claim that they have ever been excluded, nor even that they want to camp at the same place, or camp at all. If the Boy Scouts were a church (which they are not), plaintiffs would be like someone offended because it was harder to get reservations at a hotel that hosts the church group's annual convention, even though (1) they could have still made reservations, and (2) they did not want to stay at a hotel that hosted the church group.

The complaint avers that the lesbian plaintiffs "refuse" to participate in Boy Scouts and "will not permit" their son to participate because of what they understand to be the Scouts' views on sex. The same is true of the agnostic plaintiffs on account of the Scouts' views on God. They do not say that they or their son

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has been or will be barred from use of the San Diego facilities at issue. They allege no concrete personal injury¹ to themselves at all, beyond the offense to their sentiments. In their declaration, the plaintiffs say they "avoid" the Boy Scout area of Balboa Park because they "feel a strong aversion" to it. What plaintiffs do not say is that they ever tried to get reservations in the Boy Scout area of the park, or that they ever even wanted to. Rather, they "refuse to apply for use of the property" because they "feel degraded."

The closest plaintiffs get to claiming any "concrete injury" to themselves is suggesting that what they feel "degraded" by is that the Boy Scouts block out some time for Boy Scout activities, and that their reservations would have to be scheduled around Boy Scout reservations. But they do not claim that they have ever tried to make reservations, or ever would try to make reservations in the areas to which they "feel a strong aversion," or that, if they did they try, they could not get such reservations.

In their declaration, the lesbian plaintiffs say "we would not even contemplate affiliating ourselves with the Scouts, just as a Jewish person would not affiliate with a neo-Nazi group." There is nothing neo-Nazi about the Boy Scouts. Most Jews would also decline to affiliate with a perfectly well behaved Episcopalian church,

1. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[P]laintiff must have suffered an 'injury in fact' — an invasion of a legally protected interest which is . . . concrete and particularized . . .").

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Democrats would decline to affiliate with the Republican Club and Republicans would decline to affiliate with the Democratic Club. Not wanting to affiliate does not imply that the group has harmed any legally protected interest of those who decline to join or be around them.

Likewise, the agnostic parents "purposely avoid" the Boy Scout area, but do not claim that they are excluded by anything but their own feelings. They claim that they would like to have their daughter participate in aquatic programs "but . . . object to having them exposed to the Boy Scouts' religious tenets and activities." They too allege no "concrete injury" beyond the one to their feelings. They claim that their use is "inferior" because the Boy Scouts have the "role of gatekeeper." That would matter, if they sought to get through the gate. But they do not allege that they ever have or ever would try to pass through the gate, or that the Boy Scouts would keep them out if they did. They do not say that they could not sign their daughter up, just that they don't want to because she would be exposed to Boy Scout thinking.

The lesbian and agnostic plaintiffs' declarations establish that they have strong negative feelings about the Boy Scouts. But feelings do not confer standing.²

2. See *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 225 (1974) ("We have no doubt about the sincerity of respondents' stated objectives and the depth of their commitment to them. But the essence of standing 'is not a question of motivation but of the possession of the requisite (Cont'd)

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Federal courts have no judicial power in the absence of a “case or controversy,”³ which does not exist unless the plaintiffs have “standing.”⁴ And standing requires a “concrete injury,”⁵ which must be “actual or imminent, not conjectural or hypothetical.”⁶

(Cont'd)

. . . interest that is, or is threatened to be, injured by the unconstitutional conduct.’ ” (quoting *Doremus v. Board of Education*, 342 U.S. 429, 435 (1952)). See also *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 486 (1982) (“[T]hat concrete adverseness which sharpens the presentation of issues,’ *Baker v. Carr*, 369 U.S. 186, 204 (1962), is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself.”)

3. See U.S. Const., art. III, § 2, cl. 1.

4. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982).

5. *Baranowicz v. Commissioner of Internal Revenue*, 432 F.3d 972, 973 (9th Cir. 2005) (quoting *Knisley v. Network Associates, Inc.*, 312 F.3d 1123, 1126 (9th Cir. 2002)(citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992))).

6. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992).

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This case is much like *Valley Forge Christian College v. Americans United for the Separation of Church and State*,⁷ in that the plaintiffs have not established a concrete injury. In *Valley Forge*, the federal government had given away public land to a church college, treating the public benefit of the church college as a 100% setoff to the property's appraised value.⁸ The plaintiffs, who did not share the religious views of the church, objected.⁹ After disposing of plaintiffs' claim to have standing as taxpayers,¹⁰ the Court went on to address plaintiffs' claim to have standing because of the injury to the plaintiffs' right to have the government refrain from violating the Establishment Clause.¹¹ In the course of rejecting this claim, the Court squarely rejected the sufficiency of "psychological injury" of the sort claimed by the plaintiffs in the case at bar:

They fail to identify any personal injury suffered by them as a consequence of the

7. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

8. *Id.* at 467-68.

9. *Id.* at 469.

10. *Id.* at 482.

11. *Id.* at 482-487.

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alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. . . . [S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy.¹²

We are bound by the Supreme Court's holding in *Valley Forge* that psychological injury of this sort is insufficiently concrete to confer standing.

The way that the plaintiffs establish standing to the majority's satisfaction is by showing that if they wanted access to the Boy Scout areas of Balboa Park, they would be subject to priorities in favor of the Boy Scouts.¹³ This is not a persuasive position factually, at least on the record before us. True, as the majority says, the Boy Scouts have management offices at the park. But management and maintenance buildings would be closed to the general public no matter who did the management. True, as the majority says, the Boy Scouts

12. *Id.* at 485-86. The Supreme Court so concluded despite the fact that some of the plaintiffs lived near the college. It noted that proximity was not "sufficient to establish that [a plaintiff] has suffered, or is threatened with, an injury other than their belief that the transfer violated the Constitution." See *id.* at 487, n.23.

13. Order 19472-74.

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block out reservations for certain times. But the record establishes that non-Boy Scouts can use the park even at those times. The pool is occasionally blocked off, but every public pool is unavailable to all the people some of the time, and some of the people all the time, as during girls' swim, boys' swim, adult swim, physical rehabilitation swim, town swimming lessons, and "everybody out of the pool" time.

For purposes of argument, though, let us assume that during certain desirable times, no one but Boy Scouts can use at least some of the facilities. According to the record, even during the Boy Scouts' special camping periods or swim periods, portions of the facilities are blocked from Boy Scout use and reserved for the general public, although the pool becomes unavailable at times. The most that the plaintiffs complain of is that if they wanted to go to the Boy Scouts area or the pool, they could not do so on equal terms with the Boy Scouts. But they do not want to go to these places. If the Boy Scouts really do exclude non-Scouts at desirable times, there ought to be some potential plaintiffs who have been excluded or would be if they tried to get in, and would therefore have suffered concrete injury from the Boy Scouts' gatekeeping role. These plaintiffs are not among them.

These plaintiffs have never tried, and do not want to try, to use the facilities so long as the Boy Scouts are there. They find the Boy Scout area "offensive," "stressful," and "not a safe place." They do not, and would not, go to the pool, because they don't want their

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children "exposed to the Boy Scouts' religious views." They concede that "[e]ven if the City put on a . . . program there, [they] wouldn't send their children." The consequence of the Boy Scouts' presence is not that the plaintiffs cannot go there, but rather that they do not want to. That is precisely the psychological harm that *Valley Forge* holds is inadequate to establish standing.

Though unequal treatment is an injury,¹⁴ standing requires a *concrete* injury to the challenger. That means not only that there is unequal treatment, but also that the unequal treatment affects the challenger. The plaintiffs' declarations do not establish that they have been or would be victimized by the alleged inequality. I do not think that the record establishes concrete unequal treatment, because the Boy Scouts assiduously avoid excluding non-Scouts even during peak Scout times (except for the swimming pool for three weeks). The plaintiffs allegations to the contrary are "no more than an ingenious academic exercise in the conceivable."¹⁵ In essence, their argument is an argument contrary to fact: if they wanted to use the facilities that they do not want to use because they do not like being around the Boy Scouts, they *might* have to schedule their use of the park around the Boy Scouts'

14. Order 19474 (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 666 (1993)).

15. *United States v. S.C.R.A.P.* 412 U.S. 669, 688 (1972).

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times, if the Boy Scouts' reservation priority made space unavailable, which it doesn't.

It is not a concrete harm that someone else gets to go first if the plaintiff does not want to go at all. "The federal courts were simply not constituted as ombudsmen of the general welfare."¹⁶ For us to have a "case or controversy," a *sine qua non* of our power to do anything about a wrong, the plaintiff must suffer a "concrete injury" on account of the wrong. Inequality in making campground reservations and in gaining access to a pool does not injure someone who does not want to camp or swim there because of the unpleasantness of being in the presence of people with contrary beliefs about sex or God. The plaintiffs' injury, that if they wanted to use the Boy Scout area they would have to do so on unequal terms, is too "conjectural or hypothetical" to confer standing.¹⁷

These plaintiffs complain about not wanting to go to a place where the Boy Scouts are, not about being unable to get in. In the cases of ours involving crosses on public land that the majority cites, the plaintiffs

16. *Valley Forge Christian College v Americans United for Separation of Church and State*, 454 U.S. 464, 487 (1982).

17. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992) ("[P]laintiff must have suffered an 'injury in fact' — an invasion of a legally protected interest which is . . . actual or imminent, not conjectural or hypothetical.") (quotations omitted).

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actually would visit and drive in locations but for the religious symbols.¹⁸ Here, the most the plaintiffs say is that if the Boy Scouts had different views, the plaintiffs would "like to be able to" camp in the Boy Scout area, not that they would; the declarations do not even claim that plaintiffs are campers (or swimmers). Lawyers write these affidavits carefully, so if the plaintiffs could truthfully say they would camp, not just that they would like to be able to camp, they would have said so.

Difficulty in getting a reservation at a hotel because of a convention is not a concrete injury to a person who does not want to be there because the guests at the convention are repulsive to him. For much the same reason, plaintiffs have not shown that they suffered or were in danger of imminently suffering a concrete injury.

18. See *Buono v Norton*, 371 F.3d 543, 546-47 (9th Cir. 2004) (Plaintiff "regularly visits the Preserve" and "will tend to avoid Sunrise Rock on his visits as long as the cross remains standing, even though traveling [that way] is often the most convenient means of access to the Preserve."); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993) ("[The plaintiffs] avoid two public parks in San Diego which they would otherwise use.")(emphasis added).

**APPENDIX E — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF CALIFORNIA FILED APRIL 12, 2004**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

Civil No.00CV1726-J (AJB)

LORI & LYNN BARNES-WALLACE, ET AL.,

Plaintiffs,

v.

BOY SCOUTS OF AMERICA, ET AL.,

Defendants.

ORDER:

**(1) GRANTING IN PART AND DENYING IN PART
FURTHER CROSS-MOTIONS FOR SUMMARY
JUDGMENT;**

(2) DENYING MOTIONS TO STRIKE; AND

**(3) DENYING PLAINTIFFS' MOTION FOR ENTRY
OF FINAL JUDGMENT UNDER RULE 54(b).
[Doc. Nos. 237, 247, 250, 274, 277, 294.]**

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Before the Court are cross-motions for summary judgment involving the City of San Diego's (the "City") long-term lease with the Desert-Pacific Council, Boy Scouts of America ("BSA-DPC" or "Boy Scouts") for a half acre parcel of public parkland located on Fiesta Island in Mission Bay Park. [Doc. Nos. 237, 250.] Also before the Court is a motion for entry of final judgment under Fed. R. Civ. P. 54(b) filed by Plaintiffs Lori and Lynn Barnes-Wallace and their son and Michael and Valerie Breen and their son ("Plaintiffs") stemming from a settlement agreement entered into between Plaintiffs and the City. [Doc. No. 247.] Defendant City joins in Plaintiffs' motion for final judgment under Rule 54(b). [Doc. No. 262.] Each of the motions is fully-briefed and came on regularly for hearing on April 5, 2004. M. Andrew Woodmansee, Jordan Budd and M.E. Stephens appeared on behalf of Plaintiffs. John Mullen appeared on behalf of the City, and George Davidson and Scott Christensen appeared on behalf of the Boy Scouts. After hearing oral argument, the Court took the motions under submission. For the reasons set forth below, the Court (1) **GRANTS** Plaintiffs' cross-motion for summary judgment on their claims that the Fiesta Island lease violates the Establishment Clause of the federal constitution and the No Aid and No Preference Clauses of the California state constitution; (2) **DENIES** the cross-motions on Plaintiffs' claims that the Fiesta Island lease violates their equal protection rights under the federal and state constitutions as moot; and (3) **DENIES** Plaintiffs' motion for entry of final judgment under Rule 54(b) lease as moot.

*Appendix E****Procedural History***

On May 13, 2002, Plaintiffs, a lesbian and an agnostic couple and their Boy Scout-aged sons, filed a First Amended Complaint alleging that the City's long-term leases of public parkland in Balboa Park and Mission Bay Park are (1) an unconstitutional establishment of religion under the federal and state constitutions, U.S. Const. amend. I, XIV; 42 U.S.C. § 1983; Cal. Const. art. I, § 4; (2) violate the state constitution's prohibition against the provision of financial support for religion, Cal. Const. art. XVI, § 5; (3) violate their equal protection rights under the federal and state constitutions, U.S. Const. amend. XIV; 42 U.S.C. § 1983; Cal. Const. art. I, § 7; and (4) violate the City's common law duty to maintain public parkland for the benefit of the general public. On July 31, 2003, all parties moved for summary judgment on all claims. In an order dated July 31, 2003, the Court (1) granted Plaintiffs' cross-motion for summary judgment on their claims that the Balboa Park lease violated the Establishment Clause of the federal constitution, as well as the No Aid and No Preference Clauses of the California state constitution; (2) granted the BSA-DPC's and the City's cross-motions for summary judgment on Plaintiffs' claim that the parkland leases violated state common law; and (3) denied cross-motions for summary judgment on all other claims. (*See Order Granting in Part and Den. in Part Cross-Mots. for Summ. J.*); *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003). The Court was unable to determine whether the Fiesta Island lease violates the Establishment Clause and the

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California Constitution's Religion Clauses because insufficient evidence was submitted regarding the process by which the City leased the Fiesta Island property to the BSA-DPC. *Barnes-Wallace*, 275 F. Supp. 2d at 1276, 1279, 1280. Similarly, the Court was unable to determine as a matter of law whether Defendants' activities violated the federal and California Equal Protection Clauses, as there were material facts in dispute. *Id.* at 1280-85. Accordingly, in the cross-motions currently before the Court, the parties seek summary judgment with respect to the Fiesta Island lease.¹

Background Facts

In November 1987, the City entered into a 25-year lease with the BSA-DPC for a half acre parcel of public parkland located on Fiesta Island in Mission Bay Park at no charge. (Pls.' Separate Statement of Undisputed Material Facts ("SSUMF") ¶ 5.) The City Council approved the lease "for the purposes of constructing, maintaining, and operating an aquatic safety training and recreational center in boating, sailing and water sports[.]" (Decl. of Lincoln R. Ward ("Ward Decl.") ¶ 14; see also Decl. of Elvira Cacciavillani ("Cacciavillani Decl."), Ex. 3 ("Fiesta Island Lease") § 1.02.) Pursuant to the lease, the BSA-DPC was required to expend \$1.5

1. The BSA-DPC appealed that part of the motion granting Plaintiffs' cross-motion for summary judgment and denying its cross-motion for summary judgment on claims relating to the Balboa Park lease. (See Not. of Appeal.) On January 12, 2004, the Court received notice that the appeal had been dismissed for lack of jurisdiction.

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million to build and endow the Youth Aquatic Center as part of a \$4 million capital campaign. (Fiesta Island Lease § 7.19.) Accordingly, the BSA-DPC constructed an aquatic facility that offers a variety of aquatic-related youth activities. (SSUMF ¶ 7; BSA-DPC's Resp. to Pls.' SSUMF ("Resp. to SSUMF") ¶ 7.)

The lease permits the BSA-DPC to "use/book" up to "75% of all available aquatic activities up to 7 days prior." (SSUMF ¶ 9; Resp. to SSUMF ¶ 9.) Moreover, the lease requires that the BSA-DPC send a letter annually to all members of the Youth Aquatic Advisory Council advising them of the operation and procedures for using the facility "[i]n order to give all groups an equal chance to use the Youth Aquatic Facility[.]" (SSUMF ¶ 12; Resp. to SSUMF ¶ 12.) Similar to the Balboa Park lease, the Fiesta Island Lease also includes a nondiscrimination clause requiring that the BSA-DPC

not . . . discriminate in any manner against any person or persons on account of race, marital status, sex, religious creed, color, ancestry, national origin, age, or physical handicap in [its] use of the premises, including but not limited to the providing of goods, services, facilities, privileges, advantages, and accommodations[.]

(SSUMF ¶ 14; Resp. to SSUMF ¶ 14.) On July 2, 1992, in conjunction with the opening of the Youth Aquatic Center, the City Manager sent a letter to the BSA-DPC, stating that the City would "not allow any discrimination

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on any basis including sexual orientation in the use or occupancy of any City-owned property leased to the Boy Scouts of America or any other organization using City-owned property" and that the lease prohibited such discrimination. (SSUMF ¶ 15; Resp. to SSUMF ¶ 15.) Nevertheless, both the City and the BSA-DPC construe the non-discrimination clauses as a regulation of access to the property by other individuals, as opposed to the Boy Scouts' membership policies. (Resp. to SSUMF ¶ 14.)

*Discussion***I. Legal Standard**

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party can satisfy this burden in two ways: by presenting evidence that negates an essential element of the nonmoving party's case, or by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *Id.* at 322-23. If the moving party fails to discharge this initial burden, summary judgment must be denied and

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the court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

If the moving party meets this initial burden, the nonmoving party cannot defeat summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)) ("The mere existence of a scintilla of evidence in support of the nonmoving party's position is not sufficient."). Rather, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by 'the depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)). When making this determination, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. See *Matsushita*, 475 U.S. at 587. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he [or she] is ruling on a motion for summary judgment." *Anderson*, 477 U.S. at 255.

II. Federal Establishment Clause

Under the federal constitution's Establishment Clause, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The

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purpose of the Establishment Clause is to prohibit state sponsorship, financial support and active involvement in religious activity. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Under the test currently utilized by the Supreme Court, government action does not violate the Establishment Clause if (1) the action has a secular purpose, and (2) its principal or primary effect is one that neither advances nor inhibits religion. *Id.* at 612-13; *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997); *Mitchell v. Helms*, 530 U.S. 793, 807-08 (2000). At issue here is whether the City's lease of public parkland in Mission Bay Park to the BSA-DPC has the principal or primary effect of advancing religion.

To determine whether government aid has the effect of advancing religion, courts now consider whether the aid program (1) results in governmental indoctrination; (2) defines its recipients by reference to religion; or (3) creates an excessive entanglement. *Agostini*, 521 U.S. at 234. When government "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis[,] . . . the aid is less likely to have the effect of advancing religion" because it is less likely to result in state-sponsored indoctrination or the creation of a symbolic union between government and religion. *Id.* at 231. According to the plurality in *Mitchell*, if the government aids indoctrination to a broad range of recipients, it cannot be said that the government is responsible for indoctrination by any one recipient. 503 U.S. at 809. In other words, aid is neutral if the religious, irreligious

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and areligious are equally eligible. *Id.* Although Justice O'Connor in her concurrence rejected the plurality's invitation to give the principle of "neutrality" an almost singular degree of importance in Establishment Clause inquiries, she agrees that neutrality is "an important reason for upholding government-aid programs against Establishment Clause challenges." *Id.* at 837-39.

Similar to the Balboa Park lease, Plaintiffs argue that the Fiesta Island lease has the primary effect of advancing religion because it constitutes aid given directly to a religious organization and is not aid allocated on the basis of neutral, secular criteria. Plaintiffs assert that the Mission Bay Park lease is naturally perceived by a reasonable observer as an endorsement of the entire regional program of Scouting, which has as its purpose the inculcation of religious belief and observance in youth. According to Plaintiffs, the "reasonable observer" would conclude that the Fiesta Island lease is used to advance religious indoctrination. The BSA-DPC, however, contends that the lease does not have the primary effect of advancing religion.²

2. In the July 31, 2003 Order, the Court already concluded that the BSA-DPC is a religious organization and that the City's lease of public parkland to a religious organization raises Establishment Clause concerns. *Barnes-Wallace*, 275 F. Supp. 2d at 1270-73.

*Appendix E***A. Whether a reasonable observer would perceive an advancement of religion as a result of the City's failure to use a neutral process in selecting lessees**

When determining whether an aid program has the primary effect of advancing religion, the Court asks whether a "reasonable observer" would perceive an advancement of religion through government aid. *Mitchell*, 530 U.S. at 843; *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995); *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 493 (1986). The "reasonable observer" perspective establishes at least some measure of objectivity because the "reasonable observer" is "deemed aware of the history and context of the community and forum" in which the Establishment Clause challenge arises. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001); see also *Pinette*, 515 U.S. at 780. In order to determine whether a reasonable observer would perceive an advancement of religion, the Court must first ascertain whether the Fiesta Island lease was made available on a neutral basis.

Since the 1970s, the Boy Scouts sought to develop an aquatic facility for scouting youth. (SSUMF ¶ 23; Resp. to SSUMF ¶ 23.) After an unsuccessful attempt in establishing a waterfront location on Harbor Island in downtown San Diego in 1977, the Boy Scouts found a suitable location on Fiesta Island in the 1980s. (SSUMF ¶¶ 24-25; Resp. to SSUMF ¶¶ 24-25.) According to Plaintiffs, the BSA-DPC, then known as the San Diego

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County Council, Boy Scouts of America, approached the City concerning the possibility of leasing property in Mission Bay Park in 1986. (SSUMF ¶ 29.) Negotiations with the BSA-DPC, according to Plaintiffs, began after the City was notified that a Boy Scouts benefactor wished to donate the funds to construct an aquatic facility. (*Id.* ¶ 29(a).) Relying on the declaration of Michael J. Behan, the Mission Bay Park Manager from August 1986 to January 1997 who was responsible for negotiating the Fiesta Island lease with the BSA-DPC on behalf of the City, the lease was negotiated exclusively with the BSA-DPC. (*Id.* ¶ 29(b); *see also* Decl. of Michael J. Behan (“Behan Decl.”) ¶ 6.) No other organizations were involved in the lease negotiations. (*Id.*)

After receiving advice that approval of the lease was more likely to occur if other youth organizations supported the BSA-DPC’s plans, Mr. Behan avers that other youth-serving groups expressed their support for the Fiesta Island lease. (SSUMF ¶ 29(c); *see also* Decl. of M. Andrew Woodmansee in Supp. of Pls.’ Opp’n to BSA-DPC’s Mot. for Summ. J., Ex. 1 at 4 (November 24, 1986 letter from the Girl Scouts expressing approval of the “proposal by the Aquatic Facility Committee of the Boy Scouts regarding development of a youth aquatics facility . . . on Fiesta Island”). Acting under the name “Fiesta Island Youth Facility Committee,” several youth-oriented community groups in San Diego organized themselves for the purpose of developing a community youth aquatic facility on Fiesta Island. (Def. BSA-DPC’s Mem. of P. & A. in Supp. of Further

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Mot. for Summ. J. ("BSA-DPC P. & A.") at 7; Ward Decl. ¶ 6.) In fact, Lincoln R. Ward, President of the San Diego County Council from 1986 to 1988, identifies 42 youth-oriented community organizations in San Diego that had representatives in the Fiesta Island Youth Facility Committee. (Ward Decl. ¶ 6.) The Committee proposed that the City execute a long-term agreement with the BSA-DPC, as it was an organization that could fund, operate and maintain an aquatic center. (Ward Decl., Ex. 1.; *see also* SSUMF ¶ 30 ("Boy Scouts had proved able to manage a facility like the [Youth Aquatic Center] because they were already running Camp Balboa in Balboa Park.").) Similarly, the Committee determined that it would be undesirable and inefficient for the City to execute agreements with multiple organizations.

The BSA-DPC disputes Plaintiffs' characterization of the events leading up to the execution of the lease in November 1987. According to the BSA-DPC, negotiations for the Mission Bay Park lease were not exclusive. (BSA-DPC P. & A. at 8, 17; Resp. to SSUMF ¶ 29.) The BSA-DPC claims that the Fiesta Island Youth Facility Committee negotiated with the Mission Bay Park Committee and its Master Plan Subcommittee, the Park and Recreation Committee, the Police Department, and the City Council in a series of public hearings over several years. (BSA-DPC P. & A. at 8; Ward Decl. ¶¶ 7-11.) In support of this position, the BSA-DPC rely on Mr. Ward's declaration. (*See* Ward Decl. ¶ 1; *see also* Decl. of Fred R. Day ¶ 9.) According to Mr. Ward, the Youth Facility Committee was instrumental in the City's approval of a permanent building on Fiesta Island "to

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store and secure sailboats and related equipment and space for some classroom or other sit-down instruction in preparation for the activities there.”³ (*Id.* ¶¶ 8-11.)

In addition to Mr. Ward’s declaration, the BSA-DPC has submitted evidence of multiple City Manager reports. In a March 20, 1987 City Manager’s Report, then-Deputy City Manager Jack McGrory recommended that the City’s Public Facilities and Recreation Committee approve plans for a youth aquatic facility proposed by the Fiesta Island Youth Facility Committee and “direct the City Manager to negotiate with the Youth Facility Committee.” (Resp. to SSUMF ¶ 29; Decl. of Scott Christensen in Opp’n to Pls.’ Mot. for Summ. J. (“Christensen Decl.”), Ex. 1.) Moreover, in an October 6, 1987 City Park and Recreation Board Report signed by then-Park and Recreation Director George I. Loveland, but believed by the BSA-DPC to have been written by Mr. Behan, there is evidence that

3. Plaintiffs object to portions of the declarations of Lincoln Ward and Fred Day on the grounds that they constitute hearsay, conjecture and speculation. [Doc No. 277.] Accordingly, Plaintiffs request that the Court strike these portions from the record. “[O]pposing affidavits shall be made on personal knowledge, shall set forth such as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to matters stated therein.” Fed. R. Civ. P. 56(e). Because the Court has not relied on those portions Plaintiffs find objectionable, Plaintiffs’ objections are OVERRULED and the motion to strike is DENIED as moot. The Court likewise OVERRULES the BSA-DPC’s objections to Exhibits 41 and 48 of the declaration of Elvira Cacciavillani on identical grounds. [Doc. No. 274.]

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the "Youth Aquatic Facility Committee" presented information relating to their proposal for a youth aquatic center to the Mission Bay Park Committee on December 2, 1986, February 3, 1987, April 7, 1987, and August 4, 1987; and to the Public Facilities and Recreation Committee on March 29, 1987. (Christensen Decl., Ex. 2.) There is also evidence from a March 25, 1987 San Diego City Council Public Facilities and Recreation Committee Meeting addressing "a proposal by the Fiesta Island Youth Facility Committee." (Cacciavillani Decl., Ex. 16 at 304; Resp. to SSUMF ¶ 28.) In a November 19, 1987 City Manager Report, Mr. McGrory described the proposed youth aquatic center as having "a long and complex history, involving 9 reviews at publicly noticed meetings and numerous compromises." (Christensen Decl., Ex. 3 at 28.) Additionally, while Plaintiffs claim that the Fiesta Island Youth Facility Committee was not organized until after the BSA-DPC approached the City in 1986, there is evidence in the Committee's proposal itself that the group may have been in existence for at least ten years.

Although the evidence submitted by the BSA-DPC does indicate that the Fiesta Island Youth Facility Committee assisted in obtaining approval for limited permanent buildings on Fiesta Island, *i.e.*, the Youth Aquatic Center, there is no evidence that the lease itself was negotiated with any entity other than the BSA-DPC. In its previous order, the Court provided a detailed description of the process by which the City leases property, which was in effect prior to the 1987 lease with the BSA-DPC. (SSUMF ¶ 34; Resp. to SSUMF ¶ 34.) This depiction was based upon the deposition of William

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T. Griffith, the City's Real Estate Assets director. According to his testimony, once City property is available for leasing, Real Estate Assets will attempt to get a sense from the Mayor or City Council as to what should be done with the property. *Barnes-Wallace*, 275 F. Supp. 2d at 1275. Once the City's intentions are known, Real Estate Assets will either solicit interest in the property via a request for proposal ("RFP") that includes selection criteria, or recommend an exclusive negotiation with a specific prospective lessee. *Id.* at 1274. Similar to the Balboa Park lease, the City did not implement its RFP process for generating interest and soliciting competitive bids with respect to the Fiesta Island property. (SSUMF ¶ 35; Resp. to SSUMF ¶ 35; *see also* Behan Decl. ¶ 4); *Barnes-Wallace*, 275 F. Supp. 2d at 1275. The lease was made available to the BSA-DPC without inviting bids from any other organizations. (Behan Decl. ¶ 4.) Although several local youth-oriented organizations supported the City's lease to the BSA-DPC and appear to have been involved with obtaining approval for construction of a youth aquatic center, this is insufficient to demonstrate neutrality in the lease of the property itself. The involvement of other entities does nothing to alter the fact that the City chose to deal only with the BSA-DPC as a potential lessee for the Fiesta Island property.⁴

4. In support of its original motion for summary judgment, the BSA-DPC submitted the declaration of Sean Roy, the Camping Director of BSA-DPC since 2001. In his declaration, Mr. Roy explained that "[m]any youth organizations expressly encouraged and oversaw development of the San Diego Youth Aquatic Center through an Advisory Committee[.]" (Doc. No. 148, Decl. of Sean Roy ¶ 12.) In the July 31, 2003 Order, the Court found such participation insufficient. *See Barnes-Wallace*, 275 F. Supp. 2d at 1274.

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In addition, similar to the argument raised in support of its previous summary judgment motion, the BSA-DPC views the Fiesta Island lease as one lease out of over 100 leases with nonprofit groups. (BSA-DPC P. & A. at 15.) In its previous order, the Court expressly rejected this argument as being irrelevant "because there is no evidence that the parkland leases were negotiated as part of any leasing 'program.'" *Barnes-Wallace*, 275 F. Supp. 2d at 1274. With respect to the Balboa Park lease, the Court found that it was "not the result of a selection process by which any other entities had the opportunity to compete with the BSA-DPC, but [was] instead the result of exclusive negotiations between the City and BSA-DPC." *Id.* Similar to the Balboa Park lease, the City entered into exclusive negotiations with the BSA-DPC without providing other organizations an opportunity to lease the same parcel of Mission Bay Park property.

The BSA-DPC further argues that the City regularly engages in exclusive negotiations if it is in the City's best interest to do so. (BSA-DPC P. & A. at 17) (citing *Barnes-Wallace*, 275 F. Supp. 2d at 1274-75). According to the BSA-DPC, "[a]n interest in getting the City the best deal is an interest neutral toward religion." (BSA-DPC P. & A. at 17.) Despite the City's alleged practice of regularly engaging in exclusive negotiations, the City bears the burden of "tak[ing] affirmative steps to avoid an Establishment Clause violation by making the lease available to the religious, areligious and irreligious on a neutral basis." *Barnes-Wallace*, 275 F. Supp. 2d at 1275; *see also Mitchell*, 503 U.S. at 809. With

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respect to the Fiesta Island lease, the City did not afford others a real opportunity to compete. Rather, like the Balboa Park lease, “[t]he City handpicked as the preferred lessee an organization that describes religious belief and practice as fundamental to the services it provides.” *Barnes-Wallace*, 275 F. Supp. 2d at 1276.

This Court does not question the benefit provided by the Boy Scouts to the City of San Diego and the community at large resulting from the Fiesta Island lease. The BSA-DPC constructed and maintained a youth aquatic center at its own expense on public parkland. In addition, the parties do not dispute that numerous local youth organizations supported the lease of the Mission Bay Park property to the BSA-DPC. Nevertheless, this public support, as well as the Fiesta Island Youth Facility Committee’s assistance in obtaining approval for the construction of an aquatic center by appearing before various governmental committees, is insufficient to satisfy the City’s burden to implement a neutral leasing process for the Fiesta Island property. Like the Balboa Park lease, “[a] reasonable observer would most naturally view the exclusive negotiations and effective preclusion of secular groups as the City’s endorsement of the BSA-DPC because of its inherently religious program and practices.” *Id.* at 1276. Accordingly, the Court finds that the Fiesta Island lease violates the federal Establishment Clause. Plaintiffs’ cross-motion for summary judgment on this claim is therefore **GRANTED**.

*Appendix E***III. California Constitution's Religion Clauses****A. The No Preference Clause**

The state constitution guarantees the “[f]ree exercise and enjoyment of religion without discrimination or preference” and prohibits the state legislature from making a “law respecting an establishment of religion.” Cal. Const. art. I, § 4. California courts have repeatedly indicated that the state’s establishment clause is broader than the federal establishment clause due to its “no preference” clause. *East Bay Asian Local Dev. Corp. v. California*, 13 P.3d 1122, 1139 (Cal. 2000). That clause is satisfied when the government action in question does not endorse the religious views and beliefs of a particular religion or give “favored status to religion in general.” *Christian Science Reading Room Jointly Maintained v. City and County of San Francisco*, 784 F.2d 1010, 1014 (9th Cir. 1986). Even an appearance of preference is prohibited and whether the government’s action has a secular purpose is irrelevant. *Hewitt v. Joyner*, 940 F.2d 1561, 1567, 1569 (9th Cir. 1991). Public entities are subjected to a “demanding standard of constitutional compliance.” *Murphy v. Bilbray*, 782 F. Supp. 1420, 1429 (S.D. Cal.) (Thompson, J.), aff’d sub nom. *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993).

Similar to the Balboa Park lease, *Woodland Hills Homeowners Organization v. Los Angeles Community College District*, 266 Cal. Rptr. 767 (1990) provides guidance for the Court. There, a homeowners

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organization challenged a community college district's long term lease of property to a religious congregation, claiming that the lease violated the No Preference and No Aid Clauses. *Woodland Hills*, 266 Cal. Rptr. at 771. The Court of Appeal held that the lease did not violate the state constitution because the record was devoid of evidence that the lease advanced or aided Judaism or religion generally, and "[t]he District never took a stance, publicly or privately, favoring the Congregation over other religious groups or favoring the letting of the parcel only to a religious group." *Id.* at 775 (emphasis in original).

The process by which the District offered the parcel for lease was public and inclusive so that its outcome was devoid of even an appearance that the District favored the congregation throughout the process. The District's board of trustees initially sought to offer the surplus land for sale to raise finances. However, unable to sell the property, it decided to lease its surplus property. *Id.* at 769. The Board voted to adopt a resolution that the land was offered on a long-term lease not to exceed 75 years and for specified uses for a minimum of three million dollars. *Id.* Notice that the land was available to lease was (1) posted at City Hall, the county administration building and the county courthouse; (2) published in a local Daily Journal for three non-consecutive days; (3) mailed to about 275 people on the District's real property mailing list; and (4) reported about in newspapers, including on the front page of the City's newspaper and in the plaintiff's own newsletter. *Id.* The District mailed bid packages at the

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request of 41 interested bidders and held a written bid opening and an opportunity for oral bidding. *Id.* at 769-70. The only bid received by the District was from the congregation. *Id.* at 770. After reviewing and approving the congregation's bid, the District and the congregation entered a 75-year lease for three million and twenty-five thousand dollars. *Id.*

Similar to the Balboa Park lease, the Fiesta Island lease was the result of exclusive negotiations with the BSA-DPC and was entered into without the implementation of the City's own process by which City property is leased.⁵ Although several local youth-oriented organizations supported the lease of the Fiesta Island property to the BSA-DPC, like the Balboa Park lease, the City failed to make it publicly known that such property was available for lease and invite bids from other potential lessees. By failing to do so, "the City effectively precluded any competing offers." *Barnes-Wallace*, 275 F. Supp. 2d at 1278.

With respect to the Fiesta Island lease, benefits bestowed to the BSA-DPC, an admittedly religious, albeit nonsectarian, and discriminatory organization, include (1) valuable waterfront parkland at no charge

5. In the previous order, the Court did not address whether compliance with the City's leasing process would have satisfied the City's obligations under the federal and state constitutions. *Barnes-Wallace*, 275 F. Supp. 2d at 1281 n.5. Once again, the Court makes no determination as to whether adherence to the City's method by which property is leased would violate the federal and state constitutions.

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despite the City's written policy against leasing Mission Bay Park areas to discriminatory organizations, (SSUMF ¶ 40-42, 49), (2) the accommodation that the City will not apply the leases' nondiscrimination clauses to the organization's membership, (Resp. to SSUMF ¶ 49), and (3) the ability to receive fees from non-Boy Scout users, which are deposited in the BSA-DPC's general account. (*Id.* ¶¶ 46, 68, 69.) The City selected the BSA-DPC to receive the benefit of the lease without inviting bids from any other organizations. Similar to the Balboa Park lease, “[t]his preferential treatment has at least the appearance, if not the actual effect, of government advancement of religion generally and government endorsement of an organization whose religiosity is fundamental to its provision of youth services in violation of the state constitution's No Preference Clause.” *Barnes-Wallace*, 275 F. Supp. 2d at 1278. Accordingly, the Court GRANTS Plaintiffs' cross-motion for summary judgment on their claim that the Fiesta Island lease violates the state constitution's No Preference Clause.

B. The No Aid Clause

The state constitution also provides in relevant part that no city “shall ever make an appropriation, or pay from any public fund whatever, or grant anything [] to or in aid of any religious sect, church, creed, or sectarian purpose[.]” Cal. Const. art XVI, § 5. The clause “bans any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes.” *Paulson v. City of San*

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Diego, 294 F.3d 1124, 1130 (9th Cir. 2002) (en banc); see also *Christian Science Reading Room*, 784 F.2d at 1016; *California Educ. Facilities Auth. v. Priest*, 526 P.2d 513, 521 (Cal. 1974). It is “intended by its framers ‘to guarantee that the power, authority, and financial resources of the government shall never be devoted to the advancement or support of religious or sectarian purposes.’” *Priest*, 526 P.2d at 520; see also *Paulson*, 294 F.3d at 1130.

In the July 31, 2003 Order, the Court concluded that the leases constituted aid to a religious purpose. *Barnes-Wallace*, 275 F. Supp. 2d at 1279-80 (“That the BSA-DPC is a religious organization that promotes religious belief and religious practices in general is undisputed and amply supported by the record. That it is a non-sectarian organization and whether it conducts religious activities in accordance with one particular faith is immaterial.”). The remaining issue before the Court with respect to the Fiesta Island lease is whether the benefit is “indirect, remote or incidental,” as such a benefit does not violate the No Aid Clause. *Paulson*, 294 F.3d at 1131. The benefit “may qualify as ‘incidental’ if the benefit is available on an equal basis to those with sectarian and those with secular objectives.” *Id.*

As discussed above, the California Court of Appeal found in *Woodland Hills* that the neutral process by which the Community College District leased the land to the congregation safeguarded it from any appearance that it had favored Judaism or religion generally. For that reason, the lease did not violate the No Preference

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or No Aid Clauses of the state constitution. Similarly, in *Christian Science Reading Room*, the Ninth Circuit held that the Airport's rental of commercial space in its terminal to the Reading Room was an arm's length transaction and that the policy by which it rented space to various entities "did not favor or prefer any individual religion, or religion as a whole." 784 F.2d at 1015-16. As a result, the benefit to the Reading Room was indirect and incidental to the lease itself. *Id.* at 1016. Like the Balboa Park lease, rather than provide a meaningful opportunity for other groups to lease the Fiesta Island property, the City selected the BSA-DPC for favored status. *Barnes-Wallace*, 275 F. Supp. 2d at 1280. Accordingly, the Court concludes that the aid enjoyed by the BSA-DPC as a result of the Fiesta Island lease may not be characterized as "indirect, remote or incidental." Plaintiffs' claim for violation of the state constitution's No Aid Clause with respect to the Fiesta Island lease is **GRANTED**.

IV. The BSA-DPC's First Amendment Defense

The BSA-DPC raises the same defense that was asserted in connection with the previous cross-motions for summary judgment. According to the BSA-DPC, rescission of the Fiesta Island lease constitutes viewpoint discrimination. (BSA-DPC P. & A. at 21-25; BSA-DPC Opp'n at 20-22.) This argument was expressly rejected in the July 31, 2003 Order. See *Barnes-Wallace*, 275 F. Supp. 2d at 1287-88. There, the Court recognized that the BSA-DPC's right to hold and express its private views is not in issue in this litigation. *Id.* at 1287. Despite

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the BSA-DPC's contention, the Court concluded that "the BSA-DPC's status as an expressive organization does not entitle it to governmental aid, especially on terms more favorable than [that received] by other, nondiscriminatory, organizations." *Id.*; see also *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003), cert. denied, — S.Ct. —, 2004 WL 414035 (March 8, 2004) (holding that the state's decision to bar the Boy Scouts from a state workplace charitable campaign because it is a discriminatory organization did not violate the organization's First Amendment rights as an expressive association). Because the Court finds no First Amendment violation, the BSA-DPC's equal protection defense likewise fails. See *Locke v. Davey*, 124 S.Ct. 1307, 1313 n.3 (2004) (upholding the State of Washington's decision not to provide post-secondary educational grants to students pursuing a degree in devotional theology).

V. Federal and California Equal Protection Clauses

The Equal Protection Clause of the federal constitution's Fourteenth Amendment "commands that no State shall deny to any person . . . the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike."⁶

6. As noted in the Court's July 31, 2003 Order, the same analysis applies to claims brought under California's Equal Protection Clause, Cal. Const., art. I, § 7, as under the federal constitution's clause. *Barnes-Wallace*, 275 F. Supp. 2d at 1280 n.4 (citing *Bd. of Supervisors v. Local Agency Formation Comm'n*, 838 P.2d 1198, 1204-11 (Cal. 1992); *Griffiths v. Superior Court*, 117 Cal. Rptr. 2d 445, 458 (Ct. App. 2002)).

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City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). Its purpose is to ensure that the state does not intentionally and arbitrarily discriminate against individuals. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).

In connection with the motion for final judgment under Fed. R. Civ. P. 54(b), the BSA-DPC contends that this Court need not determine whether the leases are unconstitutional under another theory. (BSA-DPC's Mem. of P. & A. in Opp'n to Mot. for Final J. at 3.) Although the BSA-DPC provides no authority for this assertion, it likely stems from the general maxim that "courts are not to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *U.S. v. Kaluna*, 192 F.3d 1188, 1197 (9th Cir. 1999) (internal quotation marks omitted). "Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision. This is a fundamental rule of judicial restraint." *Id.* (internal quotation marks omitted).

Plaintiffs disagree with the BSA-DPC's position that this Court need not address the equal protection claims. First, Plaintiffs point to the fact that the Court preserved the equal protection claims for trial, instead of dismissing them. See *Barnes-Wallace*, 275 F. Supp. 2d at 1280-85. Although the Court did indeed attempt to resolve the equal protection claims in the July 31, 2003 Order, the decision to adjudicate these claims stemmed from its inability to resolve the Establishment Clause and No Aid and No Preference Clause claims

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concerning the Fiesta Island lease. Because the Court is now able to make a determination on the Fiesta Island religion claims, it is unnecessary to determine whether the leases are also unconstitutional under another theory.

Secondly, Plaintiffs rely on two Supreme Court cases in support of their position that this Court must decide the equal protection claims. (Pls.' Reply Mem. of P. & A. in Supp. of Mot. for Final J. at 2-3.) See *Soldal v. Cook County, Illinois*, 506 U.S. 56, 70 (1992); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993). In *Soldal*, the plaintiff filed a § 1983 action alleging a violation of the Fourth and Fourteenth Amendments in connection with the unauthorized eviction of the plaintiff's trailer from a mobile home park. 506 U.S. at 59. In concluding that the carrying away of the mobile home constituted an unreasonable seizure in violation of the Fourth Amendment, the Court noted that "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Id.* at 70. "Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn." *Id.* As further explained in *Good*, a case addressing "whether, in the absence of exigent circumstances, the Due Process Clause of the Fifth Amendment prohibits the Government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard[,'" 510 U.S. at 46, the Court

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ruled that “the seizure of property implicates two explicit textual source[s] of constitutional protection, the Fourth Amendment and the Fifth.” *Id.* at 50 (internal quotation marks omitted). Thus, “[t]he proper question is not which Amendment controls but whether either Amendment is violated.” *Id.* Presuming that the seizure did not violate the Fourth Amendment, the Court analyzed the seizure under the Due Process Clause. *Id.* at 52.

Despite Plaintiffs’ reliance on *Soldal* and *Good*, these cases simply stand for the proposition that courts must address each constitutional claim instead of focusing on the “dominant” claim. Although state action may trigger rights under multiple constitutional provisions, the Court cannot choose to address only a single constitutional challenge. Had the Court concluded that the Camp Balboa lease did not violate the Establishment Clause, as well as the state constitutional religion clauses, then this Supreme Court precedent mandates review of the remaining constitutional challenges. See *Sanders v. City of San Diego*, 93 F.3d 1423, 1427-28 (9th Cir. 1996) (addressing the plaintiff’s due process claim only after rejecting the plaintiff’s Fourth Amendment challenge). However, because the Court has already determined that Plaintiffs’ constitutional rights have been violated under the Establishment Clause, the Court need not address the remaining challenge under the Equal Protection Clause. See, e.g., *Guam Soc’y of Obstetricians and Gynecologists v Ada*, 962 F.2d 1366, 1374 n.10 (9th Cir. 1992) (finding it unnecessary to address the plaintiffs’

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remaining constitutional challenges to a Guam anti-abortion statute where summary judgment was granted in favor of the plaintiffs on their substantive due process claim). This position furthers the general policy disfavoring needless resolution of constitutional questions. Accordingly, in the exercise of judicial restraint, the Court declines to rule on the equal protection claims. Plaintiffs' claims that their equal protection rights have been violated under the federal and state constitutions are therefore **DISMISSED**, as they are moot.

VI. Motion for Entry of Final Judgment Under Rule 54(b)

On January 8, 2004, Plaintiffs and the City entered into a settlement agreement with respect to both the Balboa Park and Fiesta Island leases. (*See* Decl. of Andrew Woodmansee in Supp. of Mot. for Final J., Ex. B ("Settlement Agreement").) Pursuant to the Agreement, Plaintiffs and the City seek entry of final judgment under Rule 54(b) to "void and enjoin the current Camp Balboa lease." (Settlement Agreement at 4.) Moreover, the Agreement provides that the City is under no obligation to commence proceedings to evict or eject the BSA-DPC until all appeals involving both leases have been resolved in Plaintiffs' favor. (*Id.* at 3, 5.) Furthermore, the City agreed not to take a position on Plaintiffs' claims challenging the validity of the Fiesta Island lease. (*Id.* at 5.)

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Rule 54(b) provides in relevant part:

When more than one claim for relief is presented in an action, . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Fed. R. Civ. P. 54(b). Because the Court has now adjudicated all claims relating to both leases that mandate resolution, entry of final judgment under Rule 54(b) is not proper. Rather, the Clerk's office is directed to enter final judgment as to the entire action pursuant to Rule 58. *See Fed. R. Civ. P. 58; Vernon v. Heckler*, 811 F2d 1274, 1276 (9th Cir. 1987). Accordingly, the motion for entry of final judgment under Rule 54(b) is DENIED as moot.

VII. Plaintiffs' *Ex Parte* Application to Strike Declarations Submitted by the BSA-DPC in Reply to Its Further Motion for Summary Judgment

Also before the Court is Plaintiffs' *ex parte* application to strike the declarations of Scott H. Christensen and A.E. Pellerin submitted by the BSA-DPC with its reply brief in support of its cross-motion for summary judgment. [Doc. No. 294.] Plaintiffs contend that the Court should not consider evidence submitted in connection with a reply brief to a motion for summary judgment. (*Ex Parte* Application at 1.) Because the Court has not relied on these declarations in its discussion herein, Plaintiffs' *ex parte* application is DENIED as moot.

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Conclusion

Having read the parties' briefs, supporting documents and evidence, and the applicable law, and given full consideration to the arguments made by all parties and admissible evidence in support thereof, **IT IS HEREBY ORDERED** that:

- (1) Plaintiffs' cross-motion for summary judgment on their claims that the Fiesta Island lease violates the Establishment Clause of the federal constitution and the No Aid and No Preference Clauses of the state constitution is **GRANTED**;
- (2) The cross-motions for summary judgment on Plaintiffs' claims that the Fiesta Island lease violates their equal protection rights under the federal and state constitutions are **DENIED** as moot;
- (3) Plaintiffs' claims that the Fiesta Island lease violates their equal protection rights under the federal and state constitutions are **DISMISSED** as moot;
- (4) Plaintiffs' motion for entry of final judgment under Rule 54(b) is **DENIED**, as the Clerk's office is directed to enter judgment with respect to the entire action under Rule 58; and

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- (5) All evidentiary objections are **OVERRULED**
and motions to strike **DENIED** as moot.

Dated: April 9, 2004

s/ Napoleon A. Jones, Jr.
NAPOLEON A. JONES, JR.
United States District Judge

cc: Magistrate Judge Battaglia
All Counsel of Record

**APPENDIX F — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF CALIFORNIA FILED JULY 31, 2003**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

Civil No.00CV1726-J (AJB)

LORI & LYNN BARNES-WALLACE, ET AL.,

Plaintiffs,

v.

BOY SCOUTS OF AMERICA, ET AL.,

Defendants.

**ORDER GRANTING IN PART AND DENYING IN
PART CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

[Doc. Nos. 138, 146, 151]

In 2000, the Boy Scouts of America prevailed in its efforts to exclude from its membership an accomplished assistant scoutmaster because he identified himself as gay in public at a non-Scouting event. The United States Supreme Court held that the Boy Scouts of America, as a private, expressive organization, had a federal constitutional right to exclude from its membership individuals whose inclusion would “significantly affect

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the Boy Scouts' ability to advocate public or private viewpoints." *Boy Scouts of America v. Dale*, 530 U.S. 640, 650 (2000). Those protected, private viewpoints include an anti-homosexual, anti-agnostic and anti-atheist stance. In addition to holding these views, the Boy Scouts displays intolerance toward individuals who identify themselves as homosexual, agnostic or atheist by denying membership to or revoking the membership of gay and nonbelieving individuals. Despite its long-held discriminatory views, the organization has maintained a long-standing relationship with public entities including local and state governments. *Id.* at 651-53; *Boy Scouts of America v. Wyman*, __ F.3d __, 2003 WL 21545096 (2d Cir. July 9, 2003) (holding that the state did not violate the Boy Scouts' free speech rights by terminating the organization's 30-year participation in a workplace charitable campaign because of its discriminatory membership policy). At issue here is the City of San Diego's long-term lease of prized public parklands to the Boy Scouts. After *Dale*, it is clear that the Boy Scouts of America's strongly held private, discriminatory beliefs are at odds with values requiring tolerance and inclusion in the public realm, and lawsuits like this one are the predictable fallout from the Boy Scouts' victory before the Supreme Court.

In this case, Plaintiffs, a lesbian and an agnostic couple and their Boy Scout-aged sons, assert that the City's long-term lease of public parkland to the Boy Scouts is (1) an unconstitutional establishment of religion under the federal and state constitutions,

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U.S. Const. Am. 1, 14, 42 U.S.C. § 1983; Cal. Const., Art. 1 § 4; (2) violates the state constitution's prohibition against the provision of financial support for religion, Cal. Const., Art. XVI § 5; (3) violates their equal protection rights under the federal and state constitutions, U.S. Const., Am. 14, 42 U.S.C. § 1983, Cal. Const. Art. 1 § 7; and (4) violates the City's common law duty to maintain public parkland for the benefit of the general public. Plaintiffs seek a permanent injunction rescinding the leases.

Plaintiffs Lori and Lynn Barnes-Wallace and their son and Michael and Valerie Breen and their son (hereinafter, "the Plaintiffs") filed their Cross Motion for Summary Judgment. Defendants City of San Diego (hereinafter, "the City") and Desert-Pacific Council, Boy Scouts of America (hereinafter, "BSA-DPC") have also filed separate Cross Motions for Summary Judgment. Each of the motions is fully-briefed and came on regularly for hearing on March 10, 2003. Mark Danis, Andrew Woodmansee, Jordan Budd and M.E. Stephens appeared on behalf of Plaintiffs. John Mullen appeared on behalf of the City, and George Davidson and Scott Christensen appeared on behalf of the Boy Scouts. After hearing oral argument, the Court took the motions under submission.

Background

One must be heterosexual and swear a belief in a formal deity to be a member or adult leader in the Boy Scouts. *Pls.' SSUMF ¶ 18.* Although fully aware of the

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BSA-DPC's discriminatory membership policy, the City leases to it two parcels of public parkland. *BSA-DPC Resp. to Pls.' SSUMF ¶ 2.* The parkland is prized community- and nation-wide. Balboa Park is considered to be the "urban jewel" in the San Diego park system and the "Heart of the City." *BSA-DPC's Resp. to Pls.' SSUMF ¶ 4.* Mission Bay Park is a unique aquatic recreational resource of major significance and proportions. *Id. ¶ 21.*

The City first leased the 18 acre Balboa Park parcel to the BSA-DPC for \$1.00 per year in 1957. *Id. ¶ 8.* The purpose of the lease was to construct, operate and maintain a Boy Scout Headquarters and to conduct such exercises thereon as are in keeping with the principle and practices of Boy Scouting, without discrimination as to race, color, or creed. *Pls.' SSUMF ¶ 9.* The lease further provided that "the public in general shall not be excluded from said premises except at such times as their presence will conflict with the program of Boy Scouting." *BSA-DPC's Resp. to Pls.' SSUMF ¶ 9.*

Eight years before the Balboa Parkland lease was to expire, and in the midst of this litigation, the BSA-DPC requested that it and the City negotiate an extension of the lease. *Id. ¶ 10.* The City's exclusive negotiations with the BSA-DPC culminated in the December 4, 2001 vote by the City Council approving a 25-year lease (hereinafter, "the 2002 lease") for a nominal sum and annual administrative fee beginning January 1, 2002 with an option to renew for an additional 15-year term. *Id. ¶¶ 12, 14.* The 2002 lease includes a

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nondiscrimination clause prohibiting the BSA-DPC from discriminating against persons based on, among other things, religion and sexual orientation. *Id.* ¶ 15. The City agrees that the nondiscrimination clause is understood to apply only to BSA-DPC's regulation of access to the property by non-Scouting individuals and entities. *BSA-DPC's Resp. to Pls.' SSUMF* ¶ 17.

In 1987, the City also entered into a 25-year lease with the BSA-DPC for a half acre parcel of public parkland located on Fiesta Island in Mission Bay Park for no charge. *Id.* ¶ 24. The BSA-DPC constructed an aquatic facility that offers a variety of aquatic-related youth activities. *Id.* ¶¶ 24, 25. The lease also contains the same nondiscrimination clause that appears in the 2002 Balboa Park lease. As with the 2002 Balboa Park lease, the City construes the nondiscrimination clause to apply to the BSA-DPC's regulation of access to the property by non-Scouting individuals and entities. *Id.* ¶ 28.

*Discussion***I. Legal standard**

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). One of the principle purposes of the rule is to dispose of factually

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unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997). Thus, “[d]isputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment.” *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). A dispute about a material fact is genuine if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.

A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party can satisfy this burden in two ways: by presenting evidence that negates an essential element of the nonmoving party’s case, or by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party’s case on which that party will bear the burden of proof at trial. *Id.* at 322-23. “The district court may limit its review to the documents submitted for the purpose of summary judgment and those parts of the record specifically referenced therein.” *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001). Therefore, the court is not obligated “to scour the record in search of a genuine issue of triable fact.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996)

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(citing *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)). If the moving party fails to discharge this initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

If the moving party meets this initial burden, the nonmoving party cannot defeat summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) (citing *Anderson*, 477 U.S. at 252) ("The mere existence of a scintilla of evidence in support of the nonmoving party's position is not sufficient."). Rather, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by 'the depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)).

When making this determination, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. See *Matsushita*, 475 U.S. at 587. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he [or she] is

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ruling on a motion for summary judgment." *Anderson*, 477 U.S. at 255.

II. Federal Establishment Clause

The federal constitution's Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Supreme Court has identified its purpose as prohibition of state sponsorship, financial support and active involvement in religious activity. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The Establishment Clause is therefore not offended by government actions that have a secular purpose, a principal or primary function that does not advance or inhibit religion, and which do not foster an excessive government entanglement with religion. *Id.* at 612-13. At issue here is whether the City's lease of the public parkland to the BSA-DPC has the principal or primary effect of advancing religion.

To determine whether government aid has the effect of advancing religion, courts now consider whether the aid program (1) results in governmental indoctrination; (2) defines its recipients by reference to religion; or (3) creates an excessive entanglement." *Agostini v. Felton*, 521 U.S. 203, 234 (1997). When government "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis," "the aid is less likely to have

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the effect of advancing religion" because it is less likely to result in state-sponsored indoctrination or the creation of a symbolic union between government and religion. *Id.* at 231.

Three years after *Agostini*, the Supreme Court issued a plurality opinion in another school aid case, *Mitchell v. Helms*, 530 U.S. 793 (2000), in which the Court held that a federal program providing federal funds to public and private elementary and secondary schools to implement "secular, neutral, and nonideological" programs by providing "services, materials, and equipment" was not a law concerning the establishment of religion. In practice, about one-third of the funds went to private schools, most of which were parochial schools. Justice O'Connor, who wrote the majority opinion in *Agostini*, wrote a concurring opinion in *Mitchell*. The differences between the plurality opinion and Justice O'Connor's concurrence suggest *Agostini*'s limits.

Agostini effectively recast *Lemon*'s third prong as but one of the three factors in determining whether a law has the effect of advancing religion, the other two being whether the aid (1) results in governmental indoctrination; or (2) defines its recipients by reference to religion. *Agostini*, 521 U.S. at 234; *Mitchell*, 530 U.S. at 808. Justice Thomas framed the issue of effect as follows: "whether government aid to religious schools results in governmental indoctrination is ultimately a question of whether any religious indoctrination that

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occurs in those schools could reasonably be attributed to governmental action." *Mitchell*, 530 U.S. at 809. According to the plurality, if the government aids indoctrination to a broad range of recipients, it cannot be said that the government is responsible for indoctrination by any one recipient. *Id.* In other words, aid is neutral if the religious, irreligious and areligious are equally eligible. *Id.*

Justice O'Connor declined to join the plurality opinion, finding that the opinion "announces a rule of unprecedented breadth." Her concurrence rejects the plurality's invitation to give the principle of "neutrality" an almost singular degree of importance in Establishment Clause inquiries. *Id.* at 837-38. While Justice O'Connor agrees that neutrality is "an important reason for upholding government-aid programs against Establishment Clause challenges," she disagrees that "a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid." *Id.* at 839.

Despite these reservations, Justice O'Connor agreed with the plurality that the government aid program in *Mitchell* should be upheld. In finding that the program did not define aid recipients by reference to religion, she emphasized the importance of scrutinizing a government-aid program to determine whether the criteria for disbursement of the aid creates a financial incentive to undertake religious indoctrination. *Id.* at 845. No such financial incentive is

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present "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* at 846 (quoting *Agostini*, 521 U.S. at 231).

Plaintiffs argue that the leases have the primary effect of advancing religion because they are aid given directly to a religious organization and are not aid allocated on the basis of neutral, secular criteria. Plaintiffs assert that the leases are naturally perceived by a reasonable observer as an endorsement of the entire regional program of Scouting, which is administered from the Balboa Park property and has as its purpose the inculcation of religious belief and observance in youth. The "reasonable observer" would conclude that the leases are used to advance religious indoctrination. Plaintiff also argues that the leases have the primary effect of advancing religion because they are government aid to a pervasively sectarian organization. The BSA-DPC contends that as a nonsectarian organization, it is beyond the reach of the Establishment Clause, but that even if it were sectarian, the leases satisfy the Establishment Clause because they are part of a program whereby City parkland is offered to a variety of groups, both religious and secular, on a neutral basis for the secular purpose of providing recreational facilities. The City also argues that the "pervasively sectarian" test is no longer persuasive and that the City does not provide any direct funding to the BSA-DPC.

*Appendix F***A. The pervasively sectarian test cannot be reconciled with current Supreme Court cases**

The Court agrees with Defendants that, although not formally overruled, the pervasively sectarian test cannot be reconciled with the Supreme Court's recent Establishment Clause precedent. According to the pervasively sectarian test, "[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission[.]" *Hunt*, 413 U.S. at 743. Therefore, "no state aid at all [may] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones, and (2) that if secular activities can be separated out, they alone may be funded." *Roemer v Bd. of Public Works*, 426 U.S. 736, 755 (1976).

An organization is "pervasively sectarian" when its religious and secular aspects are inseparable. *Tilton v Richardson*, 403 U.S. 672, 680 (1971); *Roemer*, 426 U.S. at 759; *Bowen v Kendrick*, 487 U.S. 589, 609-610 (1988). An outright ban on federal grants to church-related colleges and universities is warranted only when "religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable." See *Tilton*, 403 U.S. at 680; see also *Roemer*, 426 U.S. 736. The category of organizations that may be called

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"pervasively sectarian" is narrow. *Mitchell*, 530 U.S. at 826 (plurality opinion). Relevant but not conclusive as to whether an organization is pervasively sectarian are (1) explicit corporate ties to a religious faith; (2) by-laws or policies that prohibit any deviation from religious doctrine; and (3) whether the organization is "religiously inspired." *Bowen*, 487 U.S. at 621.

Although the pervasively sectarian test has not yet been officially dispensed with, four members of the current Supreme Court have stated explicitly that the pervasively sectarian nature of a government aid recipient is no longer relevant. *Mitchell*, 530 U.S. at 826 (plurality opinion); see also *Columbia Union College v. Clarke*, 527 U.S. 1013 (1999) (Thomas, J., dissenting from denial of petition for writ of certiorari). In calling for its demise, the plurality in *Mitchell* noted that the Supreme Court had not relied on the test to strike down an aid program since 1985 when the Court did so in *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), and that the Court had since overruled *Aguilar* in full and *Ball* in part. In *Bowen*, the Court emphasized that the category of organizations that could be called pervasively sectarian was limited and that Justices Kennedy and Scalia had questioned whether the test was "well-founded." *Id.* at 826-827 (citing *Bowen*, 487 U.S. at 624). The Court has since upheld aid programs to students who attended

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pervasively sectarian schools, despite dissents arguing the relevance of the pervasively sectarian doctrine. *Id.* at 827.

Plaintiffs nonetheless urge this Court to follow the suggested lead of the majority in *Steele v. Industrial Development Bd. of Metropolitan Gov't Nashville*, 301 F.3d 401, 408-409 (6th Cir. 2002). The *Steele* court indicated in dicta that were it necessary it would apply the pervasively sectarian test despite its questionable vitality because (1) it has not yet been explicitly rejected by the Supreme Court, (2) the Supreme Court instructs lower courts to treat its prior cases as controlling unless the Supreme Court itself specifically overrules them and (3) *Mitchell*, the more recent Supreme Court case apparently relied on by the district court, was a plurality opinion and therefore binding only as to its holding. *Id.* at 408-409. The *Steele* court held that the government bond program in question did not violate the Establishment Clause because it was part of a neutral program available to sectarian and secular schools and conferred only an indirect benefit on the sectarian schools. *Id.* at 416. This Court, like the *Steele* Court, finds it unnecessary to apply the pervasively sectarian test.

This Court also reads the concurrence in *Mitchell* as squarely contradicting the pervasively sectarian test. The test simply cannot be reconciled with the plurality or the concurrence, which would not object to aid that "flows to an institution in which religion is so pervasive

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that a substantial portion of its functions are subsumed in the religious mission," *Hunt*, 413 U.S. at 743, so long as it does so by way of "a true private-choice program" whereby aid is dispersed to individuals who then elect to use it at a particular organization, be it secular or sectarian. *Mitchell*, 530 U.S. at 842. Justice O'Connor explains that with a per capita school aid program,

if the religious school uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement. Because the religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the aid program as *government* support for the advancement of religion.... In contrast, when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, no reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief.

Id. at 843 (emphasis in original) (quotations omitted). Justice O'Connor thus makes it clear that the fact that an organization receiving aid is "pervasively sectarian" is not determinative. This view of the Establishment Clause is irreconcilable with the view expressed in *Hunt*,

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where it is assumed that aid has the primary effect of advancing religion when it flows to a pervasively sectarian organization. *Hunt v McNair*, 413 U.S. 734, 743 (1973). This Court therefore concludes that the Supreme Court has effectively, if not explicitly, overruled use of the pervasively sectarian test. The correct inquiry here, under recent Supreme Court precedent, is whether government aid has the effect of advancing religion because the leases either result in governmental indoctrination or define their recipient by reference to religion. *Agostini*, 521 U.S. at 234. While neutrality alone does not guarantee constitutionality on either of these grounds, it is a threshold factor that must be met when the government awards aid to religious organization. *Mitchell*, 530 U.S. at 809, 838.

B. A reasonable observer would perceive an advancement of religion as a result of the City's failure to use a neutral process in selecting lessees

Whether a reasonable observer would perceive an advancement of religion as a result of the leases depends on whether the leases have been made available on a neutral basis. According to Plaintiffs', the reasonable observer "would naturally perceive the leases as an endorsement of the entire regional program of Scouting itself, which is administered from Balboa Park and has, as its fundamental and pervasive purpose, the inculcation of religious belief and observance.'" *Pls.' Mem. P. & A.* at 19.

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When determining whether an aid program has the primary effect of advancing religion, the Court asks whether a “reasonable observer” would perceive an advancement of religion through government aid. *Mitchell*, 530 U.S. at 843; *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 780 (1995); *Witters v. Washington Dep’t of Services for the Blind*, 474 U.S. 481, 493 (1986). The “reasonable observer” perspective establishes at least some measure of objectivity because the “reasonable observer” is “deemed aware of the history and context of the community and forum” in which the Establishment Clause challenge arises. See *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001); see also *Pinette*, 515 U.S. at 780.

1. The Boy Scouts are a religious organization

As an initial matter, the Boy Scouts is a religious organization with a “religious purpose” and a “faith-based mission to serve young people and their families.” *BSA-DPC Resp. to Pls.’ SSUMF ¶¶ 166, 168, 184-187*. Adult leaders and youth members of the BSA-DPC are required to have a belief in a formal deity, to swear a duty to God. *Id. ¶¶ 161, 169, 171, 173, 174, 176-181, 183, 190, 192*. Belief in God is and always has been central to BSA’s principles and purposes. *Id. ¶ 164*. Adult leaders are expected to reinforce in Scouts the values of duty to God and reverence. *Id. ¶ 235*.

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Scouting is referred to as “the ‘sleeping giant of outreach’ for local churches.” *Id.* ¶ 232. Scouting offers the church “unparalleled training, materials and facility support,” such as camps. *Id.* “There are few religions in America which can boast of millions of youth who meet each week and openly affirm their belief in God.” *Id.* ¶ 191. “Because of Scouting’s devotion to the spiritual element of character education and its willingness to submerge itself in the religious traditions of its sponsors, America’s churches and synagogues enthusiastically [have] embraced Scouting.” *Id.* ¶ 233. The undisputed facts thus show that the BSA engages in religious, albeit nondenominational, instruction through its various Scout oaths, religious emblems program, chaplaincy program, Religious Relationships Committee, religious publications and the integration of religion in Scouting activities.

Scouting activities are intended to further the BSA’s religious purpose and faith-based mission. According to the BSA’s Chaplain’s guide for Scout’s Camp, the camp program offers opportunities for the daily practice of religion by each individual, such as grace before meals, opportunity for prayer and meditation during the day, and a period of quiet time before Taps for campers accustomed to saying prayers before retiring. *Id.* ¶¶ 194. The spirit of Scout’s Camp is “that the spiritual life of the campers is strengthened, with the result that they return home with a deeper sense of reverence and a firmer desire to be faithful in religious responsibilities.” *Id.* ¶ 195. Scouting’s outdoor program further reinforces the religious nature of the Scouting program. Scout

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outings and other activities that span weekends should include an opportunity for members to meet their religious obligations. *Id.* ¶ 196.

To advance up the ranks in the BSA, Scouts must fulfill the program's "Duty to God" requirements. *Id.* ¶¶ 197-99. The BSA's "A Resource Booklet for Interfaith Prayers and Devotionals," provides for an interfaith service "for the worship of God and to promote fuller realization of the Scout Law and Promise." *Id.* ¶¶ 201-202. Scouts say grace in unison at meals, although no one individual is compelled to participate. *Id.* ¶¶ 203, 204. The BSA states that "it is highly important that grace at meals be conducted with reverence." *Id.* ¶ 203.

According to the BSA-DPC's website, the religious emblems programs are key spiritual components of the Scouting movement. *Id.* ¶¶ 205, 206. The religious emblems program is supervised and reviewed by the Religious Relationships Committee, which reports on religious subjects. *Id.* ¶ 215. BSA Chaplains promote interest in religious emblems programs by "inquir[ing] in casual conversation whether [Scouts] are working on an emblem," having "a supply of pamphlets or take-home fliers . . . available perhaps in [their] pocket as [they] wander around the camp, preparing a vesper service based on religious emblems, scheduling a talk on religious emblems, etc." *Id.* ¶ 208. The emblems are worn on Scouting uniforms. *Id.* ¶ 209-212. The BSA's magazine, "Boy's Life," includes columns devoted to various religious emblems. *Id.* ¶ 213.

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The Religious Relationships Committee also reviews religious portions of Scouting literature and publications and the BSA chaplain program. *Id.* ¶ 216. The members of the BSA-DPC Religious Relationships Committee serve as liaisons between the BSA-DPC and community religious organizations; interpret and promote the Scouting program and the religious emblems program in churches, mosques, synagogues, and other religious organizations as a resource for their children, youth, adult and family ministries; and provide chaplain support during campouts and other events and activities. *Id.* ¶ 244. The BSA has an annual “Relationships Week” national conference addressing topics such as “Scouting in the Catholic Church,” “United Methodist Scouters Workshop,” “Scouting Serves the Jewish Community,” “Scouting in the Lutheran Church,” and “Scouting in the Church’s Ministry.” *Id.* ¶ 217. In 2001, “Relationships Week” included tips on the use of Scouting programs for outreach and ministry to Catholic, Jewish and Protestant youth. *Id.* ¶ 218. The BSA-DPC board has a Religious Relationships Committee which works to provide Scouts of all religions information and support on how Scouting works religion into its programs. *Id.* ¶ 243.

Some of the purposes of the BSA Chaplaincy program are to provide worship service, promote the religious emblems programs of all faiths, help develop a reverent climate for the camping experience and help campers and staff grow in their relationships with God and with each other. *Id.* ¶ 221. Scout chaplains are

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“responsible for the supervision of spiritual activities and for creating an environment where the 12th point of Scout Law, ‘A Scout is Reverent,’ can thrive.” *Id.* ¶ 220. The BSA provided more than 100 ordained ministers to the 2001 National Scout Jamboree. *Id.* ¶ 223. The BSA has approved of the Chaplain Aide as a youth leadership position. *Id.* ¶ 224. The Chaplain Aide should (1) work with the troop chaplain to plan interfaith religious services during troop outings; (2) encourage troop members to strengthen their own relationship with God through personal prayer and devotion and participation in religious activities appropriate to their faith; (3) participate in planning sessions to ensure that a spiritual emphasis is included in troop activities; (4) help the troop chaplain (or other adult) plan and conduct an annual Scout-oriented religious observance, preferably during Scout Week in February; and (5) help the troop chaplain (or other adult) recognize troop members who receive their religious emblems. *Id.* ¶ 225.

Each year, BSA designates a Sunday as “Scout Sunday” to recognize contributions of youth and adults to Scouting through a “Worship Service.” *Id.* ¶ 228. The BSA publishes “A Scout is Reverent: Scout Sunday Observance,” which provides the format for church services on Scout Sunday. Included in this booklet are prayers, hymns, scripture readings, benedictions and a suggested article for the church bulletin titled “Bringing Youth to Christ Through a Scouting Ministry.” *Id.* The

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BSA also publishes the Boy Scout Songbook, which includes religious hymns and prayers and several religious booklets, *Id.* ¶ 229-30.

The BSA-DPC's Duty to God policy statement describes the interfaith service as follows: "Such services typically include the basic ingredients of prayer, relationship to a Creator, thankfulness, a short meaningful story or anecdote to illustrate a point, and use of universal religious terms so that all Scouts can feel spiritually enriched, regardless of creed. Invocations, program content, and benedictions at Scouting sponsored interfaith worship services should be non faith-specific in nature and content." *Id.* ¶ 246. The BSA-DPC publishes a column in its newsletter "The Beaver Log" called "Religious Relationship News." *Id.* ¶ 247. The newsletter is published on and distributed from the Balboa parkland property. *Id.* ¶ 247. The Winter 2002 issue devoted a page to religious news; congratulated Scouts who had earned religious emblems; described the religious emblems program and listed speakers available to promote the program; and contained a display ad for Christian Community theater's new season of plays. *Id.* The BSA-DPC has also published a booklet called "Interfaith Prayers and Devotionals." *Id.* ¶ 248. The Scout Shop sells manuals for the religious emblems programs. *Id.* ¶ 249. The BSA-DPC website maintains a religious relationships page and a link to the website P.R.A.Y. (Programs and Religious Activities with Youth) where Scouts can purchase religious materials. *Id.* ¶ 251.

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The overwhelming and uncontradicted evidence shows that the BSA's purpose and practices are religious.¹ The Defendants nonetheless argue that the BSA-DPC's principal or primary mission is not religious because it is not a religion per se, since it operates only in accordance with the belief that children cannot be the best kind of citizen unless they believe in God. Defendants cite to two lines of cases in support of their argument. First, they cite to cases in which courts sought to define what may or may not be considered "a religion" in contexts not analogous to that here. *See Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996)(holding in part that New Age is not a religion and that the City did not violate the Establishment clause by commissioning a statute of Quetzalcoatl, a New Age symbol, to commemorate Mexican and Spanish contributions to the City's culture); *Afrika v. Commonwealth of Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981) (holding that prisoner alleging that he was a "Naturalist Minister" of the "MOVE organization" was not entitled to a special religious diet in part because the "MOVE organization" is not a religion). In these cases, the courts were confronted with the question of whether an unconventional organization or movement

1. The Court notes that the BSA-DPC elected to dismantle its Scout Chapel after the Plaintiffs initiated their litigation. *BSA-DPC's Resp. to Pls.' SSUMF ¶ 99*. The chapel was an enclosed circular area with benches for seating and a lectern at the front. Attached to the lectern was a sign reading "A Scout is Reverent." The chapel was adorned with a sign calling it the "Camp Balboa Chapel." *Id.* The BSA-DPC is building a climbing wall in its place. *Id.*

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not requiring that its members espouse a belief in a formal deity was “a religion” triggering free exercise rights, *Afrika*, 662 F.2d at 1036, or raising Establishment Clause concerns. *Alvarado*, 94 F.3d at 1232. Neither case supports Defendants’ argument that a nonsectarian religious organization with the requirement that its members declare a belief in a formal deity is exempt from Establishment Clause concerns. Contrary to Defendants’ argument, it is well-established that the Establishment Clause prohibits government from endorsing religious belief over nonbelief. See *County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989) (the Establishment Clause is “recognized as guaranteeing religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith”); *Wallace v. Jaffree*, 105 S.Ct. 2479 (1985) (government is precluded “from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred”); *Everson v. Bd. of Educ. of Ewing TP*, 67 S.Ct. 504, 513 (1947) (the First Amendment “requires the state to be neutral in its relations with groups of religious believers and nonbelievers”); *Kreisner v. City of San Diego*, 1 F.3d 775, 783 (9th Cir. 1993)(stating that the relevant inquiry is “whether the government’s action actually conveys a message of endorsement of religion in general or of a particular religion.”)

Defendants also cite to cases holding that the Boy Scouts of America does not meet the definition of a religious organization for various purposes, including

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federal tax exemptions. The Court bases its finding on this issue on the overwhelming record developed for the purpose of litigating this case. Not only does the BSA-DPC concede that it is a religious organization, but it insists that its religiosity is fundamental to its purpose and mission of instilling values in its youth members. *BSA-DPC's Resp. to Pls.' SSUMF ¶¶ 166, 168, 186.* Based on the organization's own admission and the overwhelming record in this case, the Court finds that the BSA-DPC is a religious organization and that the City's lease of the parkland to the religious organization raises Establishment Clause concerns.

2. The City did not lease the Balboa Park property to the BSA-DPC by way of a religion-neutral process

The parties agree that whether the leases were obtained on a religion-neutral basis is the crux of this dispute. Defendants view the leases as only two leases out of over 100 leases of public land by the City. They argue that the BSA-DPC became the City's lessee by way of a neutral program through which the City leases publicly-owned land to "well over 100 nonprofit groups to advance the educational, cultural and recreational interests of the City" without regard to whether the lessees are religious. *City's Mem. P. & A. in Opp. to Pls.' Mot. for Summ. J.* at 7 (citing Rothans Decl. ¶ 19).

The Court agrees with Plaintiffs that the City's leases with other organizations are irrelevant because there is no evidence that the parkland leases were

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negotiated as part of any leasing “program.” Defendants do not point to any program criteria to which the City adheres when it leases public property, but instead rely on the bare fact that the City leases land to a large number of nonprofits. While the City does lease property to a large number of non-profits, *Pls.’ Resp. to Defs.’ SSUMF ¶ 63*, the undisputed evidence shows that the Balboa Park lease is not the result of a selection process by which any other entities had the opportunity to compete with the BSA-DPC, but is instead the result of exclusive negotiations between the City and the BSA-DPC. The City Council voted on December 4, 2001, eight years before the 1957 lease expired, to continue leasing the property to the BSA-DPC, *id. ¶ 13*, after this lawsuit was filed, after the BSA-DPC approached the City and requested negotiations to extend the lease and after hearing extensive public comment regarding the Boy Scouts discriminatory policies. *Id. ¶ 10; BSA-DPC’s Resp. to Pls.’ SSUMF ¶¶ 29-36*. On the other hand, neither the City nor the BSA-DPC has presented the Court with any evidence regarding the process by which the Fiesta Island lease was obtained. While there is one reference to the participation of a variety of youth-serving organizations’ participation in the creation of the Youth Aquatic Center, *Roy Decl. ¶ 12*, this is not sufficient to demonstrate neutrality in the leasing of the property itself.

The City does have an established process by which City properties are put up for lease, but which was not used in the 2002 lease of the Balboa Park property to the BSA-DPC. *Transc., March 10, 2003 hearing on*

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Cross-Mot.’s for Summ. J. at 21:18-24. In his deposition, William T. Griffith, the City’s Real Estate Assets director, testified at length regarding the process by which the City determines to whom it will lease its public lands. After Real Estate Assets decides that a property is available for leasing, it goes to a committee of the City Council to “get some direction with what they would like us to do with the property.” *Cacciavillani Decl.* Ex. 11, *Griffith Dep.* 91:6-92:4. At that point, Real Estate Assets may either solicit interest in the property by doing a request for proposal (“RFP”) that includes selection criteria or, recommend an exclusive negotiation with a particular prospective lessee. *Id.* 92:5-93:10; 93:16-94:8. More often than not, the process is competitive and the City generates as much interest as it can by doing an RFP or comparable procedure. *Id.* 93:11-15. When deciding which prospective lessee should receive a non-revenue lease, the City looks at a list of factors, including the proposal, how it serves the public or particular need, whether it adds employment or sales tax, the benefits to the community, the services that the lessee would provide, who the lessee serves in the community, the lessee’s mission statement, funding and level of professionalism. *Id.* 94:9-95:16; 105:20-106:11. According to Mr. Griffith, “[t]here’s not a lot of encouraging that [the City] need[s] to do in the sense of, hey, we want you to come to the park. I think it’s more an issue of - of almost the selection criteria. . . . There are organizations that would like to get into the park that there is not space available.” *Id.* 139:19-140:7. Ultimately, the Mayor and the City Council decide whether to approve a lease based on information provided them by Real Estate

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Assets. *Id.* 95:17-20; 107:3-12. The Mayor and City Council also provide guidance to Real Estate Assets through the process and, via the City Manager, make recommendations whether to enter into exclusive negotiations with a particular organization. *Id.* 95:21-96:6. From the outset, Real Estate Assets tries to get a sense from the Mayor and City Council whether they want to negotiate with a particular organization, in which case Real Estate Assets recommends to the City Council or City Council committee that it enter into exclusive negotiations with that organization. *Id.* 108:14-109:6.

The City Council renewed the 2002 Balboa parkland lease 8 years before the 1957 lease expired. Mr. Griffith testified in his deposition that the negotiations concerning the new or renewed lease were effectively the same as exclusive negotiations. *Id.* 133:20-10; 134:23-135:5. The City's RFP process for generating interest and soliciting competitive bids was not implemented. *Id.* 134:11-13. Instead, Real Estate Assets was "given direction to negotiate an extension of [the DPC-BSA's] - or a renegotiation of their existing lease for [an] additional term on the lease of years-term of years on the lease. And since that authorization was given, they were - there was six or seven years left on the term of their lease. It would have the same effect. We couldn't have done an RFP at that point because there was six or seven years left on their lease. So I don't think the - we actually requested an exclusive negotiation because we couldn't have negotiated with anyone else for seven - seven years anyway." *Id.* 135:6-20.

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The BSA-DPC disputes Plaintiffs' statement that the City entered into exclusive negotiations with the Boy Scouts, arguing that "[n]o other party has ever approached the city with an interest in leasing Camp Balboa." *Pls.' Resp. to Defs.' SSUMF ¶ 12.* At oral argument, counsel for the City stated that

the City Manager did negotiate exclusively with the Boy Scouts for the City of San Diego for the Camp Balboa lease. That did not prevent any other organization from submitting a bid. There was an extensive public hearing on the City Council's decision, on December 4, whether to renew these leases, or the Camp Balboa lease. There were dozens and dozens of speakers.... Any organization, youth-serving or otherwise, could have come in and said, 'we can make a better deal than the Boy Scouts made.' The exclusive negotiations were between the manager and the Desert Pacific Counsel. The City Council had the final decision after a public hearing. There was a noticed public hearing. All comers could have come and offered a better deal, should they have chosen to do so. While I appreciate the fact that these were exclusive negotiations, that doesn't preclude the fact of opportunity for some other group to come in and say, 'we could do better,' and no one did.

See Transc., March 10, 2003 Hrg. on Cross-Mots.' for Summ. J. at 20:18-2112. The burden, however, was on

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the City to take affirmative steps to avoid an Establishment Clause violation by making the lease available to the religious, areligious and irreligious on a neutral basis.

Rather than provide all interested organizations a meaningful opportunity to demonstrate their respective capacities for providing the desired service, the City provided not even the pretense of neutrality. Its reliance on the public's right to speak at the City Council meeting in opposition to the lease, which was already negotiated and on the meeting agenda for final approval, does not provide competing organizations a real opportunity to lease the property. By entering into exclusive negotiations with the BSA-DPC without affording others a real opportunity to compete, the City effectively prevented any secular groups from having an opportunity to obtain the benefit. The City handpicked as the preferred lessee an organization that describes religious belief and practice as fundamental to the services it provides. A reasonable observer would most naturally view the exclusive negotiations and effective preclusion of secular groups as the City's endorsement of the BSA-DPC because of its inherently religious program and practices.

The material undisputed facts accordingly show that the Balboa Park lease violates the federal Establishment Clause. Plaintiffs' Motion for Summary Judgment on this claim is therefore **GRANTED** as to the Balboa Park lease. The Plaintiffs' and Defendants' Cross-Motions for Summary Judgment are **DENIED** regarding Plaintiffs'

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claim that the Fiesta Island lease violates the federal Establishment Clause because none of the parties have presented any evidence regarding the process by which the City leased the Fiesta Island property to the BSA-DPC.

II. California Constitution's Religion Clauses

The California Constitution contains two clauses concerning separation of church and state that are in issue here: (1) the No Preference Clause in Article I, section 4; and (2) the No Aid Clause in article XVI, section 5. They are addressed independently of Plaintiff's federal Establishment Clause claim because "state courts have not limited their interpretation of the California Constitution to the United State's Supreme Court's interpretation of the federal constitution." *Hewitt v. Joyner*, 940 F.2d 1561, 1566 (1991). "[T]he state courts have developed a body of law regarding the appropriate relationship between religion and the state which is independent from that of federal courts." *Id.* at 1565.

A. The No Preference Clause

The state constitution guarantees the "[f]ree exercise and enjoyment of religion without discrimination or preference" and prohibits the state legislature from making a "law respecting an establishment of religion." Cal. Const. Art. I, sec. 4. California courts have repeatedly indicated that the state's establishment clause is broader than the federal

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establishment clause due to its “no preference” clause. *East Bay Asian Local Development Corp. v. California*, 24 Cal.4th 693, 719-20 (2000). That clause is satisfied when the government action in question does not endorse the religious views and beliefs of a particular religion or give “favored status to religion in general.” *Christian Science Reading Room Jointly Maintained v. City and County of San Francisco*, 784 F.2d 1010, 1014, 1015 (9th Cir. 1986). Even an appearance of preference is prohibited and whether the government’s action has a secular purpose is irrelevant. *Hewitt v. Joyner*, 940 F.2d 1561, 1567, 1569 (9th Cir. 1991). Public entities are subjected to a “demanding standard of constitutional compliance.” *Murphy v. Bilbray*, 782 F.Supp. 1420, 1429 (S.D. Cal.) (Thompson, J.), aff’d sub nom. *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993).

The state supreme court most recently applied the No Preference Clause in *East Bay Asian Local Development Corp.* Nonprofit organizations challenged as unconstitutional a state law granting religiously affiliated organizations the power to declare themselves exempt from historic preservation laws if they can determine in a public forum that the organization would suffer a substantial hardship if the property were designated a historic landmark. Plaintiffs argued that the statutes violated the No Preference Clause and the No Aid Clause.

East Bay holds that the No Preference Clause does not disallow state exemptions for religious organizations

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from state laws that would, if no exemption were provided, abridge those organizations' free exercise of religion. *Id.* at 720; *Catholic Charities of Sacramento, Inc. v. Superior Court*, 109 Cal. Rptr.2d 176, 189 (2001). While the lead opinion declined to definitively construe the No Preference Clause, it did provide that "the plain language of the clause suggests . . . that the intent is to ensure that free exercise of religion is guaranteed regardless of the religious nature of the religious belief professed, and that the state neither favors nor discriminates against religion." *East Bay*, 24 Cal.4th at 719. *East Bay* is therefore of no real assistance here, since the state supreme court declined to definitively construe the No Preference Clause and the Plaintiffs here do not challenge as unconstitutional an exemption in protection of free exercise.

Woodland Hills Homeowners Organization v. Los Angeles Community College Dist., 218 Cal. App.3d 79 (1990), provides guidance. In *Woodland Hills*, a homeowners organization challenged a community college district's long term lease of property to a religious congregation to develop for its religious, educational and private use. Plaintiff challenged the lease as a violation of the no preference and No Aid Clauses. The Court of Appeal held that the lease did not violate the state constitution because the record was devoid of evidence that the lease advanced or aided Judaism or religion generally, and "[t]he District never took a stance, publicly or privately, favoring the

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Congregation over other religious groups or favoring the letting of the parcel only to a religious group." *Id.* at 93-34.

The process by which the District decided to offer the parcel for lease, made the opportunity known to prospective lessees, determined the tentative terms on which the property would be leased and then made the final lease award was public and inclusive so that its outcome was devoid of even an appearance that the District favored the congregation throughout the process. The District's board of trustees initially decided to offer the surplus land for sale to raise finances. When it did not sell, it decided to lease its surplus property. The Board voted to adopt a resolution that the land was offered on a long term lease for no longer than 75 years and for specified uses for a minimum of three million dollars. *Id.* at 85. Notice that the land was available to lease was (1) posted at City Hall, the county administration building and the county courthouse; (2) published in a local Daily Journal for three non-consecutive days; (3) mailed to about 275 people on the District's real property mailing list; and (4) reported about in newspapers, including on the front page of the City's newspaper and in the plaintiff's own newsletter. *Id.* at 85-86. The District mailed bid packages at the request of 41 interested bidders and held a written bid opening and an opportunity for oral bidding. The congregation's bid was the only bid received. The board reviewed and approved it. The District and the congregation entered a 75-year lease for three million and twenty-five thousand dollars. *Id.* at 86.

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Here, as is set forth above, the City engaged in private, exclusive negotiations culminating in another long term lease of the Balboa Park property in the midst of this litigation and despite public outcry. More important in this context, the City determined to release the property to the BSA-DPC, engaged in exclusive negotiations with the organization and released the property to the organization without ever implementing its own process by which it puts properties up for lease.² *Transc., March 10, 2003 Hrg. on Cross-Mot.'s for Summ. J.* at 21:18-24. Public comment was not heard until the City and the BSA-DPC had already negotiated the material terms of the lease. Given that context, Defendants contention that other organizations were not prevented from submitting a bid sounds particularly disingenuous. See *Transc., March 10, 2003 Hrg. on Cross-Mot.'s for Summ. J.* at 20:18-2112. By failing to make it publicly known that the land was available for lease, the City effectively precluded any competing offers.

In practical terms, the City has bestowed upon the BSA-DPC—an admittedly religious, albeit nonsectarian, and discriminatory organization—the benefits of (1) valuable parkland for a nominal fee despite the City's written policy against leasing that very property to discriminatory organizations, *BSA-DPC's Resp. to Pls.' SSUMF ¶¶ 57-58*; (2) with the accommodation that the

2. The City's process for offering properties for lease was not implemented and whether compliance with it would have satisfied the City's obligations under the federal or state constitution is not considered here.

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City will not apply the leases' nondiscrimination clauses to the organization's membership, *id.* ¶¶ 15, 16, 59; (3) with the authority to exclusively occupy portions of the leased parkland for the purpose of administering the BSA-DPC's regional program and operating endeavors such as the print shop and the revenue-earning Scout Shop with about \$1 million per year in net sales, *id.* ¶¶ 75-77, 79, 83-88, 90, 104-109; and (4) the authority to charge the public user fees which are deposited into the general operating account and not designated for administration or upkeep of the leased properties.³ *Id.* ¶ 114, 117, 118. As is set forth above, the City selected the BSA-DPC to receive the benefit of the lease without public notice and an inclusive selection process. This preferential treatment has at least the appearance, if not the actual effect, of government advancement of religion generally and government endorsement of an organization whose religiosity is fundamental to its provision of youth services in violation of the state constitution's No Preference Clause. Plaintiffs' Motion for Summary Judgment as the claim for violation of the state constitution's No Preference Clause is **GRANTED** as to the Balboa Park lease. Again,

3. Individuals not eligible for membership in the Boy Scouts, including agnostics and atheists, have the take-it-or-leave-it option of forgoing use of public parkland or paying usage fees to the discriminatory organization. The BSA-DPC maintains that the fees cover the costs of operating the facility. *BSA-DPC's Resp. to Pls.' SSUMF* ¶ 114-118. There is disputed evidence that the BSA-DPC charges Non-BSA-DPC campers a higher usage fee. *Id.* ¶ 114. The BSA-DPC cites to deposition testimony that Scouts and non-Scouts pay the same fee. *Id.*

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because none of the parties here presented any evidence concerning the process by which the City leased the Fiesta Island property to the BSA-DPC, all Cross-Motions for Summary Judgment are **DENIED** as to Plaintiffs claim that the Fiesta Island lease violates the state constitution's No Preference Clause.

B. The No Aid Clause

The state constitution also provides that no city

[1] shall ever make an appropriation, or pay from any public fund whatever, *or grant anything* [2] *to or in aid of any religious sect, church, creed, or sectarian purpose, . . . nor shall any grant or donation of personal property or real estate ever be made by . . . any city . . . for any religious creed, church, or sectarian purpose whatever.*

Cal. Const. Art XVI, sec. 5. “[T]he test of the provision has enormous breadth. It is possible for the government’s transfer of ‘anything’ to violate the provision if the transfer is ‘in aid of’ any ‘sectarian purpose.’” *Paulson v. City of San Diego*, 294 F.3d 1124, 1129 (9th Cir. 2002) (en banc). Whether the aid, which need not be financial or tangible, has a secular purpose is irrelevant. *Id.* at 1130. The clause “bans any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes.” *Id.* See also *Christian Science Reading Room*, 784 F.2d at 1016; *California Educational*

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Facilities Authority v. Priest, 12 Cal.3d 593, 605 (1974). As such, it is “the definitive statement of the principle of government impartiality in the field of religion.” *Priest*, 12 Cal.3d at 604. It is “intended by its framers ‘to guarantee that the power, authority, and financial resources of the government shall never be devoted to the advancement or support of religious or sectarian purposes.’ ” *Id.*; see also *Paulson v. City of San Diego*, 294 F.3d 1124, 1130 (9th Cir. 2002).

The parties do not dispute that the City has granted the BSA-DPC a benefit by leasing the subject properties to the organization for its own and the public’s use. The issue, then, is whether the leases are aid to a religious purpose and, if so, whether the benefit is “indirect, remote or incidental.” Defendants argue that the BSA-DPC has no religious purpose because it is a non-sectarian organization. Defendants cite to no authority, and the Court is unaware of any authority, restricting application of the No Aid Clause to instances where the government aid promotes the purposes of one religion over those of another. Although the clause itself refers to “sectarian purposes,” California courts and the Ninth Circuit have consistently and for many years interpreted the clause as prohibiting aid to “religious purposes” and, when using the word “sectarian” have used it synonymously with “religious.” See e.g., *Paulson*, 294 F.3d at 1130-31; *East Bay*, 24 Cal.4th at 720; *Woodland Hills Homeowners Organization*, 218 Cal. App.3d at 93; *Priest*, 12 Cal.3d at 605. Those same courts have also

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recognized that all groups, including those opposed to organized religion, may be offended by governmental aid to a religious purpose. *Paulson*, 294 F.3d at 1131. That the BSA-DPC is a religious organization that promotes religious belief and religious practices in general is undisputed and amply supported by the record. That it is a non-sectarian organization and whether it conducts religious activities in accordance with one particular faith is immaterial.

Still, the leases do not violate the No Aid Clause if the benefit to the BSA-DPC is "properly characterized as indirect, remote, or incidental." *Paulson*, 294 F.3d at 1131. The benefit "may qualify as 'incidental' if the benefit is available on an equal basis to those with sectarian and those with secular objectives." *Id.* The parties agree that *Woodland Hills Homeowners Organization* and *Christian Science Reading Room* are the pivotal cases. As is set forth above, the California Court of Appeal found in *Woodland Hills Homeowners Organization* that the neutral process by which the community college district leased the land to the Congregation safeguarded it from any appearance that it had favored Judaism or religion generally. For that reason, the lease did not violate the no preference or No Aid Clauses of the state constitution.

The Ninth Circuit likewise held in *Christian Science Reading Room* that the Airport's rental of commercial

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space in its terminal to the Reading room was an arm's length transaction and that the policy by which it rented space to various entities "did not favor or prefer any individual religion, or religion as a whole." *Christian Science Reading Room v. City and County of San Francisco*, 784 F.2d at 1015-16. The benefit to the Reading Room was therefore indirect and incidental to the lease itself. *Id.* at 1016. For the same reasons set forth above, the BSA-DPC did not enter into the Balboa Park lease as the result of an arm's length transaction. Instead, the City selected the BSA-DPC for favored status. The aid enjoyed by the BSA-DPC as a result of that lease may therefore not be characterized as "indirect, remote or incidental." Whether the aid enjoyed by the BSA-DPC as a result of the Fiesta Island lease is "indirect, remote or incidental" is, on the other hand, indeterminable here because none of the parties has presented the Court with any evidence concerning the process by which the City leased that property to the BSA-DPC. Plaintiffs' claim for violation of the state constitution's No Aid Clause is **GRANTED** as to the Balboa Park lease. The Cross-Motions for Summary Judgment as to Plaintiffs' claim that the Fiesta Island lease violates the No Aid Clause are **DENIED**.

III. Federal and California Equal Protection Clauses

The Equal Protection Clause of the federal constitution's Fourteenth Amendment "commands that no State shall deny to any person . . . the equal protection of the laws, which is essentially a direction that all

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persons similarly situated should be treated alike.”⁴ *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). Its purpose is to ensure that the state does not intentionally and arbitrarily discriminate against individuals. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). State action therefore violates the Equal Protection Clause when it intentionally treats the plaintiff differently from other persons similarly situated in all material ways. *Lee v. City of Los Angeles*, 250 F.3d 668, 687 (9th Cir. 2001). Here, the parties dispute whether the leases result in any disparate treatment at all and, if so, whether that disparate treatment is the reason for the City’s decision to lease the parklands to the BSA-DPC. Specifically at issue is whether the City intended to discriminate against Plaintiffs and those similarly situated, and whether there has been actual discrimination.⁵

4. The same analysis applies to claims brought under California’s Equal Protection Clause, Cal. Const., art. I, § 7, as under the federal constitution’s clause. *Bd. of Supervisors v. Local Agency Formation Com.*, 3 Cal.4th 903, 913-24 (1992); *Griffiths v. Superior Court*, 96 Cal. App.4th 757, 775 (2002). The Court therefore analyzes the claims simultaneously.

5. Also at issue is whether the leases alone are sufficient evidence of a relationship between the BSA-DPC and the City so that the BSA-DPC’s discriminatory actions may be fairly attributed to the City. The parties have not addressed this argument as a distinct requirement. While the Court would address this in terms of whether the BSA-DPC is a state actor, it need not address it at all because the parties’ summary judgment motions are denied on other grounds.

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The Court finds that there is a dispute of material fact concerning each issue for the following reasons.

A. Disputed evidence of discriminatory intent

Plaintiffs contend that the City has discriminated against them and those members similarly situated to them because it knew that by leasing the parkland to the BSA-DPC it could effectively discriminate against gays, agnostics and atheists by discriminating against the public as a whole. To prevail on their unique theory, Plaintiffs must show that the record includes undisputed evidence of intentional discrimination and of unequal access to the parkland. Proof of discriminatory intent or motive is necessary to sustain an equal protection clause challenge. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977); *Lee*, 250 F.3d at 687. It is not enough to show only that a law has a disparate impact on a identifiable group. *Village of Arlington Heights*, 429 U.S. at 264-65 (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)); *Hispanic Taco Vendors of Washington v. City of Pasco*, 994 F.2d 676, 679 (9th Cir. 1993). When the challenged law is facially neutral, it must be shown that the purpose for enacting the law was at least in part "because of," not merely "in spite of," its disparate impact on an identifiable group of persons. *Feeney*, 442 U.S. at 279. That the law would have inevitable or foreseeable consequences on an identifiable class of persons raises a strong inference of discriminatory

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intent. *Id.* at 279 n. 25. That inference must, however, "ripen into proof" with other evidence. *Id.* Other evidence of discriminatory intent or motive may include the law's historical background, irregularities in the laws' passage, and the legislative or administrative history. *Arlington Heights*, 429 U.S. at 266-67; *Navarro v. Block*, 72 F.3d 712, 716 (9th Cir. 1996).

Because Plaintiffs are pursuing a disparate impact theory of discrimination, the issues of actual discrimination and intent to discriminate are related. The Court finds that there is a dispute of material fact as to both issues. Plaintiffs' theory is that the City Council "set in motion" a series of events it reasonably should have known would result in constitutional deprivation because it knew about the BSA-DPC's discriminatory membership policy and that the BSA-DPC would exclude non-Scouts from the properties by making exclusive use of the leased facilities from time to time.⁶ They make several points to support their

6. Plaintiffs also argue that the City knew that the BSA-DPC would enforce and comply with the discriminatory membership policy from the parkland property and knew that the BSA-DPC had terminated one adult leader's volunteer membership because he is gay and that it did so by mailing a letter from the parkland property. These arguments are not relevant to the issue of whether Plaintiffs and those similarly situated have access to the parklands equal to that of any other member of the public. Plaintiffs do not challenge the BSA's constitutionally protected, discriminatory membership policy applying to youth and adult members.

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contention that there is evidence in the record that the City intended to discriminate against Plaintiffs and those similarly situated. The Court addresses each in turn.

First, the Fiesta Island lease explicitly allows exclusion of the public up to 75% of the time.⁷ As Defendants argue, it is true that there is no evidence that any member of the public has been denied access, and that section 9.06 of the lease requires that the Youth Aquatic Facility be open to all youth-serving groups and that “to give all groups an equal chance to use the Youth Aquatic Facility, [the BSA-DPC] must send a letter annually to all the members of the Youth Aquatic Advisory Council advising them of your operation and procedures to use the facilities.” *City’s NOL Ex. 2 at § 9.06(1)-(2)*. These facts do not controvert the fact that the lease also provides that the BSA “can use/book no more than 75% of all available aquatic activities up to 7 days prior,” thereby enabling the BSA-DPC, a discriminatory organization, to have to the facility superior to that of the public. However, while this undisputed fact obviously shows that the City must have intended to allow the BSA-DPC to potentially reserve a larger portion of the facilities than the public, it is not

7. Plaintiffs also argue that the Court has already determined that the BSA-DPC uses the parkland exclusively for blocks of time, citing to the Court’s Order finding that Plaintiffs had standing to bring the claims addressed in this Order. The findings that the Court made in that initial Order regarding usage were preliminary, before the parties had completed discovery and before the record that is now before the Court had been developed.

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undisputed evidence of the City's intentional discrimination toward Plaintiffs and those similarly situated.

Next, Plaintiffs contend that the City's decision to construe the nondiscrimination clauses prohibiting discrimination on the basis of, among other classifications, religion and sexual orientation, as not applying to the BSA-DPC's membership is evidence of its intent to discriminate. *Id.* at § 7.04; *City's NOL Ex.* 23, *FAC Ex.* at § 7.04. Unlike other governmental entities, the City decided not to condition its re-lease of the Balboa Park property to the BSA-DPC on the organization's avowal that it would not, contrary to its current policy, discriminate in membership. See e.g., *Boy Scouts of America v. Wyman*, __ F.3d __, 2003 WL 21545096 (2d Cir. July 9, 2003); *Evans v. City of Berkeley*, 127 Cal.Rptr.2d 696 (2002) (petition for review granted). On the other hand, Plaintiffs point to no evidence that the BSA-DPC has discriminated against any individual in violation of this lease term. Without more, the City's construal of the nondiscrimination clause does not evidence an intent. It shows only that the City leased the parkland to the BSA-DPC despite its discriminatory practices.⁸ Plaintiffs must show that its reason for enacting the law was at least in part "because of," not

8. It is this Court's opinion that the City could refuse to lease the parkland to the BSA-DPC because it is discriminatory without violating the organization's First Amendment rights. That does not, however, translate into the requirement that the City must refuse to lease the parklands or that its decision to lease the parklands despite the BSA-DPC's discrimination is evidence of its own intent to discriminate.

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merely 'in spite of,' " a disparate impact on the Plaintiffs and those similarly situated. *Feeney*, 442 U.S. at 279.

Next, Plaintiffs contend that the City knew that the BSA-DPC would make exclusive use of the properties from time to time, thereby barring the public, including Plaintiffs and those similarly situated, from access to the parklands. As is set forth below, the extent to which the BSA-DPC has exclusive or preferential use of the parkland is disputed.

Finally, Plaintiffs point out that the City failed to follow procedural requirements in renewing the 2002 Balboa Park lease as evidence of a discriminatory intent to preclude equal access to the public and therefore to gays and nonbelievers. *Id.* "[D]epartures from established practices may evince discriminatory intent." *Nabozny v. Podlesny*, 92 F.3d 446, 455 (7th Cir. 1996) (citing *Village of Arlington Heights*, 429 U.S. at 267). Plaintiffs contend that the City Council violated the City's own policy, San Diego City Council Policy No 700-04, against leasing Balboa Park property to discriminatory organizations and rejected its own Real Estate Assets Department's recommendation that a 10-year lease was sufficient to amortize the DPC-BSA's capital improvements and instead approved a 25 year lease with a 15 year renewal option. The City does not deny that it is leasing the Camp Balboa parkland to the BSA-DPC despite San Diego City Council Policy No. 700-04.

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Having reviewed the parties' arguments and the evidence to which they point, the Court concludes that there is a sufficient dispute of material fact to preclude summary judgment in favor of either party on the issue of whether the City leased the parkland with intent to discriminate against Plaintiffs and those similarly situated. For the reasons set forth below, the Court also finds that there is a sufficient dispute of material fact to preclude summary judgment in favor of either party on the issue of whether the public and therefore the Plaintiffs and those similarly situated have unequal access to the public parkland.

B. Disputed evidence of discriminatory effect

"[I]n order for a state action to trigger equal protection review at all, [the state] action must treat similarly situated persons disparately." *Silveira v. Lockyer*, 312 F.3d 1052, 1088 (9th Cir. 2003) (citing *City of Cleburne*, 473 U.S. at 439); *McLean v. Crabtree*, 173 F.3d 1176, 1185 (9th Cir. 1999). Plaintiffs argue that they are afforded inferior access to and use of the parklands in comparison to the access afforded members of the general public who, if they desire, may become members of the BSA-DPC. Unlike the general public, Plaintiffs are not able to use the parkland as members of the public or as members of the BSA-DPC when it is booked for "Scout only" use.⁹

9. Plaintiffs also argue that they are afforded inferior access to the leased parkland because the City does not construe
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Whether and the extent to which the BSA-DPC has exclusive or preferential use of the parkland is disputed. The BSA-DPC contends that it offers reservations on a first-come, first-served basis and that the only reason anybody has been denied access to the parklands is because of a pre-existing reservation. *Pls.' Resp. to City's SSUMF ¶ 47.* On the other hand, the record does contain evidence that the Boy Scouts are able, by penciling in their own reservations in advance, to effectively preclude others from using the parklands during periods of high demand. *BSA-DPC's Resp. to Pls.' SSUMF ¶¶ 26, 126-128.* The BSA-DPC offers contradictory explanations for how it takes reservations for use of the Balboa Park property, claiming both that anybody can make reservations as far in advance as they wish, *BSA-DPC's Resp. to Pls.' SSUMF ¶¶ 123, 124,* but also that reservations could be made up to three months in advance and would be accepted only if there was no conflict with "other scheduled Scouting functions." *Id. ¶ 123.* The Fiesta Island lease, on the other hand, explicitly allows the BSA-DPC to "use/book" up to "75% of all available aquatic activities up to 7 days prior," effectively enabling at least a portion of the public to always use the facilities as long as they plan at least one week in advance. *Id. ¶ 26.*

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the leases' nondiscrimination clauses as applying to BSA-DPC membership or employment related to the parkland. The Court views this argument as a red herring since Plaintiffs neither allege employment discrimination nor challenge the Boy Scout's right to have a discriminatory membership policy.

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Neither is it clear the extent to which the BSA-DPC actually monopolizes the parklands. While Plaintiffs contend that the BSA-DPC at times enjoys periods of exclusive use, Pls.' SSUMF ¶ 19, the BSA-DPC contends that it never uses 100% of the available space at Camp Balboa or at the Aquatic Center. *BSA-DPC's Resp. to Pls.' SSUMF ¶ 19*. While Plaintiffs state that the Balboa Park campground is unavailable to the public and reserved for Cub Scout Day Camp for approximately eight weeks during the summer, *Pls.' SSUMF ¶ 130*, the BSA-DPC asserts that the public may use remaining campgrounds and other facilities. *BSA-DPC Resp. to Pls.' SSUMF ¶ 130*. Copies from the Camp Balboa reservation book do, in fact, state that the BSA-DPC has monopolized the campground for periods of time.¹⁰ Other documents confirm camp closures for periods of time. *Cacciavillani Decl. Ex. 62*. The BSA-DPC does not dispute that it monopolizes the campgrounds for periods of time and relies only on the fact that the public may use the parkland's other facilities. *BSA-DPC's Resp. to Pls.' SSUMF ¶¶ 131, 132; 133*. For example, it responds that Camp Balboa "was not in fact closed" during the summer of 2001 because "the Girl Scouts reserved the pool" for specified dates and, in response to the remaining closures states that "Scout groups never use 100% of available space at Camp Balboa." When asked

10. The BSA-DPC reserved the entire campground from July 2 through August 17, 2001 for its Summer Day Camp; from February 23-25, 2001 for Spring Encampment; from March 23-25 for an unspecified reason; again from May 25-27, 2001; and again December 31, 2001-January 5, 2002. *Pls.' SSUMF ¶ 131*, *Pls.' NOL Exs. C, D.*

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how often the BSA-DPC uses the entire campground, the organization's witness estimated "[probably] not half the time." *Cacciavillani Decl.* Ex. 37, Kienke Dep. 63:24-644. He explained that "scouting groups come in and maybe do something like a camperee, and they would - they would possibly request all - the whole area." *Id.* at 64:24-65:3. Camparees usually last from a Friday night until Sunday. *Id.* at 65:9-10; *Pls.' SSUMF ¶ 134*. Kienke further testified that while non-scouting groups can reserve a campsite during a day-camp period at Camp Balboa, that he was not aware of any such instance. *Id.* 170:13-23.

Neither does the BSA-DPC disagree that the Fiesta Island facility is unavailable to the public for six weeks during the summer when the Scouts conduct a summer camp program, four weeks of which are reserved exclusively for the Boy Scouts. *Pls.' SSUMF ¶¶ 138-140*. Rather, the BSA-DPC again states that groups are still able to use certain parts of the facility, here stating that groups regularly reserve the dormitories and that two weeks of Sea Camp is open to non-Scout youth groups. *BSA-DPC's Resp. to Pls.' SSUMF ¶¶ 139, 142*.

Both sides have offered statistics quantifying actual BSA-DPC usage in comparison to public usage. Plaintiffs rely on documents prepared by the BSA-DPC before litigation was initiated and measure usage in terms of the number of individual Scouts versus number of individuals from the public. Defendants rely on a statistical study done for the purposes of litigation and measure usage in terms of "available days." The Youth

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Aquatic Center's 2001 Quarterly Reports show that the BSA-DPC made up almost two-thirds of users of that facility. Another one-fourth of the users came with another youth organization called Sea Camp, and the general public made up the remainder, about 10%. Pls.' SSUMF ¶ 143. At the December 4, 2001 City Council hearing, counsel for the BSA-DPC, measuring usage in terms of users, stated that "one in five guests at Camp Balboa are [sic] not members of the Boy Scouts." *Cacciavillani Decl.* Ex. 16; *Amended Transc. of San Diego City Council Hearing of Dec. 4th, 2001* at 35:5-6. Here, the BSA-DPC, using the concept of "available days," contends that

Overall, non-Scout groups are the primary users of the Aquatic Center. In the first three quarters of 2002, on 66% of the available days a non-Scout group used some function room or aquatic equipment at the Aquatic Center, and on 28% of available days a Scout group used some such room or equipment. In 2001, on 47% of available days a non-Scout group used some function room or aquatic equipment at the Aquatic Center, and on 30% of available days a Scout group used some such room or equipment. In 2000, on 26% of available days a non-Scout group used some function room or aquatic equipment at the San Diego Youth Aquatic Center, and on 29% of available days a Scout group used some such room or equipment.

BSA-DPC's Resp. to Pls.' SSUMF ¶ 143.

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The Court cannot conclude based on the record before it that the public, and therefore the Plaintiffs and those similarly situated, have unequal access to the public parkland. Not only are Plaintiffs pursuing a novel theory of discrimination, the issues of whether the public itself has been afforded unequal use of the parkland and whether the City leased the parkland to the BSA-DPC at least in part for the purpose of affording unequal access are disputed. The parties' Cross-Motions for Summary Judgment are therefore DENIED.

IV. State common law claim

Plaintiffs contend that the leases are in violation of state common law requiring that public parkland not be diverted from public use because the leases allow the BSA-DPC to use significant portions of the parkland for its private, administrative purposes, including the enforcement of its discriminatory membership policy, and because the leases enable the BSA-DPC, a private and discriminatory organization, to have preferential use of the parkland. To support its claim, Plaintiff relies on a line of cases exemplified by *San Vicente Nursery School v. County of Los Angeles*, 147 Cal. App.2d 79 (1956), in which the California Court of Appeal found that a private school's exclusive use of a building in a public park was an unlawful diversion of public park property because it was to the unreasonable exclusion of members of the public and benefitted only the limited number of children attending the school. See *id.* at 86. See also *Slavich v. Hamilton*, 201 Cal. 299 (1927).

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On the record before the Court Plaintiffs' argument would have great appeal were it not for the fact that the City of San Diego is a charter city with plenary power in municipal affairs subject only to federal and state constitutional law and the charter itself. Cal. Const., art. XI, sec. 5; *Ainsworth v. Bryant*, 34 Cal.2d 465, 469 (1949). With regard to its municipal affairs, the City is not subject to the state common law on which Plaintiffs rely. “[T]he city has all powers over municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations and restrictions contained in the charter. . . . Thus in respect to municipal affairs the city is not subject to general law except as the charter may provide.” *City of Grass Valley v. Walkinshaw*, 34 Cal.2d 595, 598-99 (1949). “The power of a charter city over exclusively municipal affairs is all embracing, restricted and limited only by the city's charter, and free from any interference by the state through the general laws.” *Simons v. City of Los Angeles*, 63 Cal. App.3d 455, 468 (1976).

While the task of determining whether a particular activity is a “municipal affair” is typically an ad hoc inquiry, *City of Long Beach v. Dep't of Industrial Relations*, ___ Cal.Rptr.3d ___, 2003 WL 21641013, at *5 (Cal. Ct. App. July 14, 2003), it is well established that “park regulation is a municipal affair.” *Id.* at 467. “A charter city has inherent authority to control, govern and supervise its own parks. The disposition and use of park lands is a municipal affair.” *Id.* at 468 (internal quotations omitted). See also *City of Marysville v. Boyd*, 181 Cal. App.2d 755, 757 (1960) (holding that charter

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city had authority to deed public parkland to the county for the purpose of erecting a courthouse in part because city's charter was silent on issue); *Wiley v. City of Berkeley*, 136 Cal. App.2d 10, 15 (1955).

Plaintiffs argue that this case is materially distinct from the cases to which Defendants cite because the latter deal with conflicts between state legislation and city charters, whereas here the conflict is between the city charter and state common law. Plaintiffs do not explain how the distinction is material and the argument ignores the sweeping grant of authority provided to charter cities. Plaintiffs also contend that their claim "does not deal with how the City operates or regulates Mission Bay Park or Balboa Park," but with "the ability of all citizens to access public parkland in the first instance." *Pls.' Reply to City's Opp. Br.* at 8. Defendants do not dispute that the City is subject to federal and state constitutional law, and Plaintiffs' claims attacking the leases as being in violation of federal and state constitutional law are discussed above. The argument is an attempt to bootstrap this state common law claim into a constitutional law claim. Plaintiffs' constitutional law claims are considered separately. Finally, Plaintiffs contend for the first time in their opposition brief that the leases violate section 55 of the City Charter itself, which rededicates Balboa Park thereby affirming the city and state dedications that the lands be held in trust forever for public use. *Pls.' Opp. to City's Mot. for Summ. J.* at 26. A party may not defeat summary judgment by asserting new legal theories in an opposition brief.

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See *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1293 (9th Cir. 2000). As a charter city, the City of San Diego is not subject to common law in the leasing of the parklands at issue here. Defendants' Cross-Motions for Summary Judgment on Plaintiffs' state common law claim are GRANTED.

V. The BSA-DPC's First Amendment right to free expression

The BSA-DPC's right to hold and express its private views is not in issue here. Plaintiffs do not challenge the BSA-DPC's right as an expressive organization to discriminate in its membership against gays and nonbelievers. Rather, Plaintiffs challenge the parkland leases as the City's unconstitutional endorsement of the BSA-DPC as a religious organization and as the means to discriminate against gays and nonbelievers. Nonetheless, Defendants argue that rescission of the leases would be unconstitutional viewpoint discrimination. Defendants contend that the BSA-DPC not only has the right to discriminate privately against gays and nonbelievers, but that it also has the right to do so while leasing the parkland property. Contrary to Defendants' argument, the BSA-DPC's status as an expressive organization does not entitle it to governmental aid, especially on terms more favorable than those held by other, nondiscriminatory, organizations.

Defendants argue that the BSA-DPC is the beneficiary of a leasing program analogous to the

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programs in a line of cases exemplified by *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). In *Rosenberger*, the University of Virginia created a campus program whereby student groups submitted bills for student activities related to educational purposes from outside contractors for payment by the fund, which received its money from mandatory student fees. The plaintiff filed suit after the University denied his Christian student newspaper's application for payment of printing costs on the ground that publication of the newspaper was a "religious activity" because it "promoted or manifested a particular belief in or about a deity or an ultimate reality." *Id.* at 827. The Supreme Court held in part that the University's denial of funding was unconstitutional viewpoint discrimination in a designated public forum and because "[t]here is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause," since the aid program was neutral toward religion. *Id.* at 840, 846.

Here, the leases are not the result of a "program," let alone a program neutral toward religion, and there is no nexus between the purpose of the leases and the protected expression. As is set forth above, the City selected the BSA-DPC for preferential treatment. The leases are therefore not part of a designated public forum, but are instead a nonpublic forum in which the City selected its recipient by making the value judgment that the BSA-DPC alone is best suited to fulfill the City's needs with respect to the parkland. See *Transc., March*

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10, 2003, Hrg. on Cross-Mot. for Summ. J. at 20:18-21:12. Whether the BSA-DPC is the lessee of the parkland has absolutely no impact on or connection to the BSA-DPC's ability to maintain its discriminatory membership policy.

The Court accordingly rejects Defendants' argument that rescission of the leases would amount to unlawful viewpoint discrimination. The government does not automatically engage in unconstitutional viewpoint discrimination when it determines, as it did here, whether to award a government subsidy by making a value judgment about the recipient's suitability for the subsidy. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998). Finally, Defendants' argument would fail even if the City decided not to lease the parkland to the BSA-DPC because of its discriminatory membership policy. The government's decision to exclude organizations with discriminatory membership policies is viewpoint neutral when the purpose for the decision is to protect persons from the effects of discrimination and not to exact a price for the organization's protected expression. *Wyman*, __ F.3d __, 2003 WL 21545096 at *10 (holding that the state's decision to bar the Boy Scouts from a state workplace charitable campaign because it is a discriminatory organization did not violate the organization's First Amendment rights as an expressive association). See also *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985). Defendants argument that rescission of the leases would violate the organization's First Amendment right to expression is therefore rejected.

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Conclusion

Having read the parties' briefs, supporting documents and evidence, and the applicable law, and given full consideration to the arguments made by all parties and admissible evidence in support thereof, **IT IS HEREBY ORDERED** that:

- (1) Plaintiffs' Cross-Motion for Summary Judgment on their claims that the Balboa Park lease violates the Establishment Clause of the federal constitution and the No Aid and No Preference Clauses of the state constitution is **GRANTED**;
- (2) The BSA-DPC and City's Cross-Motions for Summary Judgment on Plaintiff's claim that the parkland leases violate state common law are **GRANTED**;
- (3) The Cross-Motions for Summary Judgment on all other claims are **DENIED**.

Dated: July 30, 2003

s/ Napoleon A. Jones, Jr.
NAPOLEON A. JONES, JR.
United States District Judge

cc: Magistrate Judge Battaglia
All Counsel of Record

**APPENDIX G — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF CALIFORNIA FILED APRIL 13, 2001**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CASE NO. 00-CV-1726-J (AJB)

**LORI & LYNN BARNES-WALLACE;
MITCHELL BARNES-WALLACE;
MICHAEL & VALERIE BREEN;
and MAXWELL BREEN,**

Plaintiffs,

v.

**CITY OF SAN DIEGO and BOY SCOUTS OF
AMERICA - DESERT PACIFIC COUNCIL,**

Defendants.

**ORDER DENYING SUMMARY JUDGMENT
MOTION ON COUNTS I-IV**

**ORDER GRANTING SUMMARY JUDGMENT
MOTION ON COUNTS V and VI**

**ORDER DENYING MOTION TO DISMISS COUNT
IV FOR FAILURE TO STATE A CLAIM**

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Defendants City of San Diego ("the City") and Desert Pacific Council, Boy Scouts of America ("Boy Scouts") have each filed a summary judgment motion asserting that Plaintiffs Lori & Lynn Barnes-Wallace and their son Mitchell Barnes-Wallace ("Plaintiffs Barnes-Wallace"), and Michael & Valerie Breen and their son Maxwell Breen ("Plaintiffs Breen") lack standing to bring this lawsuit.¹ The summary judgment motion is **GRANTED** with respect to Causes of Action V and VI, and **DENIED** with respect to Causes of Action I-IV. Defendants' motion to dismiss for failure to state a claim and Plaintiffs Rule 56(f) motion are also **DENIED**.

1. The Court has received the following documents in connection with this motion: moving papers from both Defendants and supporting declarations by Cox and Holman; an Opposition Brief from Plaintiffs, supporting declarations by Stephens and Cacciavillani, and evidentiary objections to the Cox and Holman declarations; and Reply Briefs from both Defendants and a declaration by Devaney. The Court is also in receipt of Plaintiffs' Supplemental declarations from Cox and Holman, Defendant's Supplementary Stephens Declaration, and Plaintiff City of San Diego's Objection to the Supplementary Stephens Declaration.

*Appendix G***BACKGROUND**

The following facts are not in dispute. To be a member of the Boy Scouts, adult leaders and youth must take the following oath:

On my honor I will do the best
To do my duty to God and my country
And to obey the Scout Law;²
To help other people at all times;
To keep myself physically strong,
Mentally awake, and morally straight.

(Cox Decl. ¶ 3). The Boy Scouts regards homosexual conduct as inconsistent with the Scout Oath requirement to be "morally straight." (*Id.* ¶ 4). Consistent with the Boy Scouts' policies, known or avowed atheists, agnostics and homosexuals are ineligible for membership in the Boy Scouts³. (Cox. Decl. ¶ 4).

2. The Scout Law provides: A Scout is Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, Reverent. (Cox Decl. ¶ 3).

3. Both the United States Supreme Court and the California Supreme Court have affirmed the Boy Scouts ability to exclude homosexual persons from membership and deny them the ability to become scoutsmasters in keeping with the Boy Scouts' viewpoint that homosexuality is immoral. See *Boy Scouts of America and Monmouth Council v. Dale*, 530 U.S. 640 (2000) (holding that, as an expressive organization, the Boy Scouts may exclude persons from membership based on the Boy Scouts' view that homosexuality is immoral) and *Curran*
(Cont'd)

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The San Diego City Council leases publicly-owned property to the Boy Scouts under two long-term leases, one for property at Fiesta Island and the other for an 18.5 acre portion of Balboa Park. The Fiesta Island lease is for a term of 25-years beginning in 1987, at no cost to the Boy Scouts, (Cox. Decl. Ex. 1 §§ 2.01, 3.01), and for the purpose of "constructing, maintaining, and operating an aquatic safety training and recreational center in boating, sailing and water sports[.]" (*Id.* § 1.02). The Boy Scouts constructed and operate the San Diego Youth Aquatic Center ("SDYAC") at the Fiesta Island site. (Cox Decl. ¶ 9). The City supplies the water. (*Id.* ¶ 12). Improvements, structures, etc. become the City's property at the City's option upon expiration or termination of the lease. (Cox. Decl. Ex. 1 § 6.10(a)). The lease contains a nondiscrimination clause, prohibiting discrimination in the providing of the services and facilities on account of, *inter alia*, religious creed. (Cox. Decl. Ex. 1 § 7.04).

The Fiesta Island lease prohibits the Boy Scouts from "wholly or permanently exclud[ing]" the general public, but allows the Boy Scouts to impose "reasonable restrictions" designed to allow the Boy Scouts to use the premises for the purposes of the lease. (Cox Decl.

(Cont'd)

v Mount Diablo Council of the Boy Scouts, 17 Cal.4th 670 (1988) (holding that the Boy Scouts is not subject to the Unruh Civil Rights Act because it is not a "business establishment" within the statute's meaning or a "traditional place of public accommodation" despite having some of the attributes of a place of public accommodation).

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Ex. 1 § 1.11). The lease requires that at least 25% of the usage be by non-Scouting groups, (Cox. Decl. ¶ 14), but permits the Boy Scouts to "use/book no more than 75% of all available aquatic activities up to 7 days prior." (Cox Decl. Ex. 1 § 9.06(3)). Actual usage of the facilities from 1997 to 2000 was about 50% Scouts. (*Id.*). The Boy Scouts make the facilities available to Scouts and non-Scouts on a first-come, first-served basis, except for six weeks during the summer when the SDYAC sponsors a summer camp program, four weeks of which are exclusively for Scouts. (Boy Scouts P&A at 17).

The Balboa Park lease is for a term of fifty years beginning in 1957, for the cost of one dollar per year, (Cox. Decl. Ex. 3 (B)-(C)), and for the purpose of "construction, operation, and maintenance of a Boy Scout headquarters and Appurtenances thereto, and to conduct such exercises thereon as are in keeping with the principles and practices of Boy Scouting, without discrimination as to race, color, or creed and for no other purpose." (*Id.* (A)). The Boy Scouts have constructed numerous improvements and fixtures on the site, which they may remove upon termination or expiration of the lease. (Cox. Decl. Ex. 3 (D)(5)). Last year the Boy Scouts received a federal Community Block Grant of about \$50,000.00 to repair roofs at the site. (Boy Scouts P&A at 6).

The lease provides that the "public in general shall not be excluded from said premises except at such times as their presence would conflict with the program of Boy Scouting." (Cox. Decl. Ex. 3 (D)(21)). The facility is

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reserved for the use of Boy Scouts members for about six to eight weeks each summer. (Cox Decl. ¶ 19). Actual use of the facilities is “primarily by Scouting groups[.]” (Boy Scouts P&A at 6). The lease does not specify a percentage of time or use that must be made available to the general public. The campsites are available to Scouts and non-Scouts by reservation. (Supp. Cox Decl. ¶ 2).

Plaintiffs Barnes-Wallace are a lesbian couple and their son, and Plaintiffs Breen and their son are agnostics. Plaintiffs allege that they are denied equal access to the public properties in question because of their sexual orientation and religious non-belief. (Opp. at 1). They base their claim of unequal access on two theories. First, because the parents are ineligible for Scout membership and because they will not allow their sons to join the Boy Scouts, (Cacciavillani Decl. Ex. 11 ¶ 2 and Ex. 12 ¶ 2; Cox Decl. ¶ 4), they are formally excluded from the subject parkland whenever the Boy Scouts are using it. (*Id.* at 2). Second, even when they are allowed to use parkland, they must pay user fees to the Boy Scouts and thereby subsidize a private organization that discriminates against them. (*Id.*). Plaintiffs base their claim against the City not only on its being a party to the lease, but also because the City has allegedly declined to enforce the nondiscrimination clauses contained in both leases. (*Id.*). Specifically, Plaintiffs allege that the leases in question violate the United States and California Constitutions’

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Establishment and Equal Protection Clauses;⁴ the California Constitution's prohibition against the provision of financial support for religion;⁵ a duty under California common law to maintain public parks for the benefit of the general public; and the City of San Diego's Human Dignity Ordinance.⁶ Plaintiffs also bring a claim for breach of contract. Plaintiffs seek declaratory and injunctive relief.

DISCUSSION**I. Legal Standard — Federal Standing Doctrine**

Defendants challenge Plaintiffs standing to pursue their First through Third Causes of Action, each of which alleges a constitutional claim, and their Fourth Cause of Action, which alleges a violation of California common law. Standing is a threshold question of "whether the litigant is entitled to have the court decide the merits of the dispute[.]" *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The source of this restriction on the courts' power is Article III's case or controversy requirement, which deems appropriate for judicial redress only those harms suffered by the plaintiff, "even though a court's judgment may benefit others collaterally." *Id.* at 499. The purpose of the restriction is to "assure that the complainant seeking to adjudicate his claim was the

4. U.S. Const. Amend. XIV; Cal. Const. of 1868, art. I, § 7.

5. Cal. Const. of 1868, art. XVI, § 5.

6. San Diego City, Ca, Code Div. 96 § 52.9601 *et seq.*

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proper party to present the claim in an adversary context and in a form historically viewed as capable of judicial resolution." *See Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 218 (1974). A case or controversy within the meaning of Article III exists where (1) the plaintiff has suffered an injury in fact that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) there is a causal connection between the plaintiff's injury and the alleged illegal act; and (3) it is likely that a favorable decision by the court would redress the injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

The standing doctrine also includes several prudential concerns that are not constitutional requirements but "considerations that are part of judicial self-government." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). For example, courts usually decline to exercise jurisdiction where the plaintiff's complaint is nothing more than a generalized grievance, "shared in substantially equal measure by all or even a large class of citizens." *See e.g., Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974) and *United States v. Richardson*, 418 U.S. 166 (1974).

The party invoking federal jurisdiction bears the burden of establishing the existence of standing. *Lujan*, 504 U.S. at 561. "Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States." *See Valley Forge Christian College*, 454 U.S. at 475. Where a defendant challenges the existence

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of standing in a summary judgment motion, the plaintiff "must 'set forth' by affidavit or other evidence 'specific facts' for which purposes of the summary judgment motion will be taken to be true." *Lujan*, 504 at 561. Although Defendants assert that Plaintiffs have not and cannot fulfill any of the standing doctrine's requirements, the main thrust of their argument is that Plaintiffs cannot demonstrate that they have suffered an injury in fact.

A. Injury in fact

The United States Supreme Court has steadfastly insisted that "the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). The plaintiff's claimed injury must be "concrete and particularized," or, in other words, the injury "must affect the plaintiff in a personal and individual way," *Lujan*, 504 U.S. at 560 n.1. The injury must also be "actual or imminent, not conjectural or hypothetical." *Id.* at 560.

1. Direct injury

The undisputed facts pertaining to the question of whether Plaintiffs have suffered or will imminently suffer an injury in fact are as follows. Plaintiffs Barnes-Wallace are a lesbian couple and their son, and residents of the City of San Diego. (Cacciavillani Decl. Ex. 11, Barnes-Wallace Decl. ¶ 1). It is not clear whether Mitchell Barnes-Wallace would be denied membership on the basis of his parents' homosexuality, but it is undisputed

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that Lori and Lynn Barnes-Wallace would be denied membership. (Cox. Decl. ¶ 4). It is also undisputed that the Barnes-Wallaces purposely do not use, and have not sought to use, the 18.5 acre portion of the Park that is leased to the Boy Scouts. (*Id.* ¶ 4). The Barnes-Wallace's motivation for refusing to seek use of that portion of the Park is that they "object to the Boy Scouts' teaching, on this public parkland, that homosexuality is wrong," they "would feel uncomfortable and nervous there," "the permanent presence of the Scouts on the land is a constant reminder of their teachings . . . and infringes upon our right to use and enjoy what should be a public area," and they "do not want to communicate to [their] children that [their] city doesn't care about [them] and what that they must put up with discrimination." (*Id.*). The Barnes-Wallaces also consciously avoid the SDYAC at Fiesta Island for the same reasons despite their desire to have their son participate in youth aquatic activities at the Aquatic Center. (*Id.* ¶ 6).

Plaintiffs Breen are residents of the City of San Diego who "believe in neither the existence nor non-existence of God." (Cacciavillani Decl. Ex. 12 Breen Decl. ¶ 1). Like the Barnes-Wallaces, the Breens have not sought membership for their son in the Boy Scouts. Again, while it is unclear whether the Boy Scouts would deny membership to Maxwell Breen, his parents' membership would be denied because of their non-belief. (*Id.* ¶ 2). Also like the Barnes-Wallaces, the Breens purposely avoid the 18.5 acres of Balboa Park leased to the Boy Scouts. (*Id.* ¶ 4). They "object to the Boy Scouts' religious activities and religious indoctrination of young

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boys on this public parkland, as well as to the physical presence of a chapel on the property." (*Id.*). "[They] feel that, if [they] used the property, [they] would be communicating to [their] children that discrimination by the City is permissible and must be endured rather than contested." (*Id.*). The Breens consciously avoid the SDYAC facilities at Fiesta Island for the same reasons, although they do use the remainder of the Island for bike riding and family activities. (*Id.* ¶ 6).

Because the Plaintiff parents are not, and cannot, become members of the Boy Scouts, their use of the 18.5 acres of parkland leased to the Boy Scouts is limited by the terms of the lease and the Boy Scouts' actual use. In other words, they do not have the option of obtaining access to the public parklands equal to that of a Boy Scout because the Scouts would not accept them as members. The Boy Scouts do not dispute that use of the Balboa Park facility is "primarily by Scouting groups[.]"⁷ (Cox Decl. ¶ 18).

7. Plaintiffs submit a transcript of a November 14, 2000 San Diego City Council Public Hearing at which Dan McAllister, President of the Desert Pacific Council, Boy Scouts of America, spoke in support of renewing the fifty-year lease upon its expiration in 2007. In response to Council member Judy McCarty's question asking "[W]hat percent of the time is the Balboa facility used by Boy Scouts versus used by assorted other organizations?", Mr. McAllister answered that the facility is used by the Scouts 95% of the time. The Court, however, declines to accept the transcript as evidence on which to base a summary judgment order because it is not a certified transcript and the Court therefore has no means of determining its accuracy and authenticity. See Fed. R. Evid. 902(4).

(Cont'd)

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Similarly, the Plaintiffs' use of the SDYAC is limited by the terms of the lease, which guarantees public availability only 25% of the time and permits the Boy Scouts to "use/book no more than 75% of all available aquatic activities up to 7 days prior." (Cox Decl. Ex. 1 § 9.06(3)). As non-Boy Scouts, Plaintiffs are therefore denied use of the facilities anytime they attempt to reserve the facilities less than seven days in advance and the Scouts have already reserved the facilities for

(Cont'd)

It is undisputed that the Balboa Park facility is not available for general public use for six weeks during the summer when the Boy Scouts sponsor a Cub Scout day camp, unless the Boy Scouts are not using *every* campsite. The Boy Scouts state in a declaration that "Scouts and/or non-Scouts use *some* of the campsites at the Balboa Park campground on almost every weekend of the year. That Scout troops or other Scouts groups use some campsites on a given weekend does not preclude non-scouts from using other campsites that same weekend. . . . [C]ampsites are available to Scouts and non-Scouts on a first-come, first-served basis. Whoever reserves them first gets to use them. On some weekends, three or fewer campsites are used, and the rest go unused. Occasionally, all campsites are used on a weekend. On most weekends, however, there are at least some campsites that are available for use and actually go unused. In addition, the campground is generally available, and rarely used, during the week, including during the summer when the Cub Scout Day Camp is not in session. The Council reserves the campground for the Cub Scout Day Camp it sponsors for a few weeks during the summer each year. Other groups or individuals could reserve the campground to put on similar activities if they desired." (Cox Supp. Decl. ¶ 2).

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their own use.⁸ Actual usage of the facilities from 1997 to 2000 was about 50% Scouts. (*Id.*).

The issue very deliberately presented by Plaintiffs is whether they have standing despite never having used, or even attempted to use, the facilities in question. The answer to that question is clear. Plaintiffs' refusal to use the public parklands prevents them from establishing a direct injury in fact, which requires that the Plaintiffs be affected "in a personal and individual way," and that the injury be "actual or imminent." *Lujan*, 504 U.S. at 560 n.1.

2. Impaired use of the public parkland

Plaintiffs Breen assert an additional theory of direct injury. They argue that their refusal to use the properties in question does not preclude the Court from finding that they have suffered an injury in fact. They premise their argument on a line of cases recognizing that "when a plaintiff alleges that the government has unconstitutionally aligned itself with religion, standing may be based on finding that the plaintiff has been injured due to his or her not being able to freely use public areas." See *Ellis v. City of La Mesa et al.*, 990

8. The Fiesta Island is unavailable for general public use at least four, and perhaps six, weeks during the summer when the SDYAC sponsors a summer camp. Two weeks of the camp are open to non-Scouting groups, but the facilities are still not available for general public use. (Cox Decl. ¶ 13). Additionally, the Fiesta Island lease requires a minimum of only 25% general public use. (*Id.* ¶ 14).

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F2d 1518, 1523 (9th Cir. 1993), *cert. denied*, 512 U.S. 1220 (1994). Plaintiffs Breen state that they object to the Scouts' "religious activities, religious symbols and chapel" on the Balboa Park property, and the Boy Scouts' "religious tenets and activities" with respect to the Fiesta Island property. (Breen Decl. ¶¶ 4 and 6). Defendant City acknowledge that the case law on which Plaintiffs rely "deals with physical displays and symbols (usually of Christian crosses, nativity scenes, stations of the cross, and the like), the conscious avoidance of which arguably allows a Plaintiff standing to challenge such displays." (City's Reply Br. at 5). The City asserts that "[t]here are no outward symbols or displays that have been recognized as potentially constitutionally offensive at the leased properties in question in this case." (*Id.*).

It is undisputed that the Balboa Park facility has what the Scouts call the "Scout Chapel."⁹ (Cox Decl. Ex.

9. Common usage of the word "chapel" signifies a Christian place of worship. Dictionary definitions include:

1 a: a small or subordinate place of worship; esp: a Christian sanctuary other than a parish or cathedral church b: a church subordinate to and dependent on the principal parish church to which it is a supplemental of some kind 2: a private place of worship: a: a building or portion of a building or institution (as a palace, hospital, prison, college) set apart for private devotions and often for private religious services b: a room or recess in a church that often contains an altar and is separately dedicated and that is designed esp. for meditation and prayer but is sometimes used also for small religious services[.]

Websters Third New International Dictionary 375 (1993).

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4). Defendants describe “the so-called ‘chapel’”¹⁰ as “an open-air meeting area that has benches and a stage area with a podium. There is a small sign that says “Scout Chapel” and another above the stage area that says “A Boy Scout is reverent.” (Cox. Supp. Decl. ¶ 3). Plaintiffs description of the chapel differs somewhat from Defendants’: “[T]he chapel is a circular area enclosed by a low wooden fence, and marked with a sign that reads ‘Camp Balboa Chapel.’ The chapel contains benches for seating. Behind a wooden pulpit at the front of the chapel are several pointed wooden arches, one of which has a wooden sign attached to it reading “A Scout is Reverent.” (Compl. ¶ 43). While the Court can speculate that the presence of a facility called a chapel might not be enough to prevent a plaintiff from having full and equal access to public property, it is unable to conclude based on the descriptions provided that the Scout Chapel is not a physical display or symbol. Although Defendant Boy Scouts have submitted to the Court several pictures of the Balboa Park facility’s structures in support of their summary judgment motion, they neglected to include one of the chapel. (Cox Decl. Ex. 5).

There is also a factual dispute regarding the use to which the chapel is put. The Defendants describe it as “simply an open air meeting area,” (Boy Scouts Reply Br. at 6 n.6), whereas the Plaintiffs claim that the site is used for “worship services conducted in connection with

10. The Boy Scouts themselves have designated the site a chapel. (Cox Decl. Ex. 4).

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the Scouts' religious activities" consistent with the Boy Scouts pedagogical objectives. (Opp. at 17).

Defendants cite to *Hawley v. City of Cleveland*, 24 F.3d 814 (6th Cir. 1994), cert. denied, 475 U.S. 1047 (1986), in support of their claim that simply identifying an area as a chapel is not objectionable under the Establishment Clause. (Boy Scouts Reply Br. at 6 n.6). Defendant's reliance on *Hawley* is unpersuasive. The case itself does not answer the question of whether the plaintiffs had standing but instead addresses the merits of the case and finds that the lease of a space in an airport by the City to the Catholic Diocese for the purpose of operating a chapel did not violate the Establishment clause. In fact, on a previous appeal, the Sixth Circuit had determined that the plaintiffs had alleged sufficient facts to establish standing to pursue their Establishment Clause claim on two separate theories: municipal taxpayer standing and impingement on their right to freely use the public property. *Hawley v. City of Cleveland*, 773 F.2d 736 (1985). The presence of a chapel, identified on its exterior only by "a simple sign saying 'chapel,'" and "stained glass windows in or around the exterior doors," was sufficient to prevent the plaintiffs from using the public property freely. *Id.* at 737. The Court therefore concludes that the presence of a chapel on public property may be sufficient to establish a direct injury in fact, and that there exists a dispute of fact regarding the physical description of the Scout Chapel

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that prevents the Court from granting Defendants' summary judgment motion.¹¹

B. Injury in Fact as Municipal Taxpayers

Plaintiffs Barnes-Wallace and Breen also assert standing to litigate this case as municipal taxpayers. “[M]unicipal taxpayer standing simply requires the ‘injury’ of an allegedly improper expenditure of municipal funds,” or a “pocketbook injury.” See *Cammack v. Waihee*, 932 F2d 765, 770 (9th Cir. 1991), cert. denied, 505 U.S. 1219 (1992). Additionally, “the taxpayer must demonstrate that the government spends ‘a measurable appropriation or disbursement . . . occasioned solely by the activities complained of’” See *Doe v. Madison School Dist. No. 321*, 177 F.3d 789, 794 (9th Cir. 1999) (quoting *Doremus v. Bd. of Educ. of Borough of Hawthorne*, 342 U.S. 429, 434 (1952)).

It is undisputed that Plaintiffs are municipal taxpayers.¹² Plaintiffs challenge the Balboa Park and

11. This discussion does not apply to the Fiesta Island property or to the Barnes-Wallaces. Because Plaintiffs Breen have not established the existence of any physical, religious displays on the Fiesta Island, they have not established direct injury in fact to challenge the Fiesta Island lease. Because the Barnes-Wallace make no declaration that they have avoided either property on these grounds, they have not established a direct injury in fact to challenge either lease.

12. Lori Barnes-Wallace owns a home, rental property and a small business in the City of San Diego, and both Lori and Lynn
(Cont'd)

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Fiesta Island leases as municipal subsidies in the form of below-market rent. (Opp. at 21). Defendants assert that leasing noncommercial land for no fee or a nominal fee is insufficient to establish municipal taxpayer standing because Plaintiffs must show that there was an actual *expenditure* of funds. (Boy Scouts Reply Br. at 5; City Reply Br. at 6).

Plaintiffs assert that as municipal taxpayers they have suffered the requisite "pocketbook injury" because "[b]y and through defendant City's subsidy and support of defendant BSA-DPC's activities upon the leased premises, and the resulting loss and expenditures of municipal revenue, plaintiff municipal taxpayers are forced to support illegal and unconstitutional activity." (Compl. ¶ 75). Defendants contend that Plaintiff's attempt to demonstrate the requisite "pocketbook injury" fails because "there is no significant appropriation or expenditure of City funds on the challenged leases, that the City actually benefits from the leases by saving on the necessary costs of maintaining the properties, that the properties have been significantly improved as a result of the leases, and that the properties never have been, and are not now, viewed as sources of municipal revenue." (City Reply Br. at 6).

(Cont'd)

Barnes-Wallace are municipal taxpayers. (Cacciavillani Decl. Ex. 11 Barnes-Wallace Decl. ¶ 10). Michael Breen is a small business owner and Michael and Valerie Breen are homeowners and municipal taxpayers in the City of San Diego. (*Id.* Ex. 12 Breen Decl. ¶ 10).

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The Ninth Circuit has not yet addressed the issue of whether an appropriation of public benefits, as opposed to a direct expenditure, or loss of revenue may satisfy the "pocketbook injury" requirement for municipal taxpayer standing. In support of their argument that the leases amount to a subsidy and lost revenue supporting their standing to defend the public fisc, the Plaintiffs cite to the following published circuit court cases: *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989); *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985); and *Doe v. Duncanville Independent School Dist.*, 70 F.3d 402 (5th Cir. 1995).

In *Foremaster*, the plaintiff challenged, in part, a city subsidy to the Church of Latter Day Saints to help defray the cost of lighting the St. George Temple in St. George, Utah. *Foremaster*, 882 F.2d at 1486. The Tenth Circuit held that the subsidy caused the plaintiff injury because "[r]evenue from the sale of electricity helped subsidize the lighting of the Mormon temple" and "purchasers of municipal electricity are less well off and . . . may very well pay higher rates." *Id.* at 1487.

In *Hawley*, the plaintiffs challenged the lease of space in a public airport terminal to the Catholic Dioceses of Cleveland for use as a chapel. As discussed above, the Sixth Circuit denied the City's motion to dismiss on two grounds. First, the Sixth Circuit concluded that the presence of the chapel prevented the plaintiffs from having free use of the public property. The Court denied the motion to dismiss for the additional reason that the record did not contain

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sufficient facts to conclude that the lease resulted in a loss of revenue. It nevertheless accepted the plaintiffs theory that harm to the public fisc, and municipal taxpayer standing, may be established by showing that a lease for a nominal amount may result in loss of revenue. *Id.* at 741.

In *Doe*, the plaintiffs challenged several school district policies, including one allowing the distribution of bibles to students by a private organization. Although it did not explicitly address the issue of whether any action other than a direct expenditure would support standing, the Fifth Circuit did hold that the plaintiffs lacked standing because the record contained no evidence that the school district "expends any funds or resources on its policy of permitting the Gideons to distribute bibles to the fifth grade class." *Id.* at 408.

Common sense dictates that the long-term leases, which provide the Boy Scouts with 18.5 acres of Balboa Park at no cost for fifty years and a significant portion of Fiesta Island for the nominal sum of one dollar per year for twenty-five years, are valuable public resources. The Court cannot accept Defendants' contention that City has actually benefitted financially from the leases because there is an issue of fact as to the fair market value of the properties in question, the effect on the fair market value of the Boy Scouts' improvements,¹³

13. The Court is not even convinced that the cost of the improvements are relevant to the issue of whether there has
(Cont'd)

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and the cost of maintaining the properties. Until Defendants present the Court with a meaningful evaluation of the value of the properties in question, there exists a dispute of fact precluding the Court from concluding that the City has derived a financial benefit from the leases.

Defendants also present the issue of whether a long-term lease of public parkland for no charge or a nominal fee can be said to have a significant detrimental impact on the public fisc even where the City states that it does not view that property as a source of revenue.¹⁴ That

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been an expenditure of municipal funds because the issue is whether the City's action has impacted the public fisc, not how much the Boy Scouts have spent on the land. It is also important to note that while all improvements at the Balboa Park site become the property of the City upon termination of the lease, the improvements at the Fiesta Island site do not. (Cox Decl. Ex. 1 § 610(a)).

14. The Real Estate Assets Director states that

The properties in question are public parklands, and as such, have always been viewed by the City primarily as recreational, educational and cultural resources, and generally not as sources of municipal revenue. These properties have never provided tax revenue to the City, and they have not been identified in any budgetary documents or forecasts as future sources of such revenue. If the properties were not now leased to the Boy Scouts, or if the City

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argument, if accepted, would always defeat municipal taxpayer standing in instances where the City contributes anything other than a direct outlay of funds because everything the City does can be characterized as not-for-profit and non-commercial. (City Reply Br. at 6). Second, the City rents other public properties for profit to non-profit groups, for rents including up to nearly \$130,000 per year, supporting the argument that the City fisc would benefit greatly from the leases in question if the City decided to lease them for even a fraction of their true value.¹⁵ (Opp. at 7 n.2). The Court

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were to decide to lease them to some other organization, they would probably be leased to similar, non-profit service organizations on similar terms as those in the contested leases.

(Griffith Decl. ¶ 4).

15. Plaintiffs submit a City of San Diego Manager's Report addressing the issue of whether "the [Natural Resources & Culture Committee should] recommend that the current Council Policies 700-4 and 700-12 be amended to include specific procedures, guidelines and rental rates to implement a more equitable policy of leasing and selling City-owned property to non-profit organizations?" On the subject of fiscal impact of non-profit subsidies, the City Manager's Office stated that "If all non-profits paid fair market rent staff estimates the City would receive approximately an additional \$2,000,000,000 annually. City staff costs to administer the non-profit leases equals in excess of \$200,000 annually. Maintenance costs for City facilities occupied by non-profits is mostly absorbed into Facilities Maintenance Division's budget." (Stephens Supp. Decl. Ex. B at 1).

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sees no reason why the City's choice to contribute valuable parkland rather than a direct outlay of cash should preclude a finding of injury in fact. Additional undisputed facts show that the City provides water at no cost to the Boy Scouts for the SDYAC, (Boy Scouts P&A at 6), and that the City provided the Boy Scouts with a \$50,000.00 grant to finance the replacement of a roof at the Balboa Park facility. (*Id.* at 4; Cox Decl. ¶ 17). Based on the undisputed facts presented thus far in the record showing that Plaintiffs are municipal taxpayers and that they are challenging an allegedly illegal and significant expenditure of municipal tax dollars, Plaintiff Barnes-Wallace and Breen have established an injury in fact as municipal taxpayers.

C. Causation and Redressability

Defendant Boy Scouts argues that "a favorable decision would do nothing to redress the only purported injury to the municipal fisc — i.e., the supposedly below-market rent. Even if the leases were terminated, the City would re-release the properties (assuming the City could find another lessee) at the same rent." (Boy Scouts P&A at 15). Defendant's argument misstates the Plaintiff's injury. Plaintiffs do not challenge the leases as being "below-market" value. Rather, Plaintiffs allege that they are injured as municipal taxpayers because of an illegal subsidy using public resources. The remedies sought include a declaration that Defendants' leases of public parkland in Balboa Park and on Fiesta Island violate specific federal, state, and local laws and therefore may not lawfully be performed; and a

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permanent injunction prohibiting the City from continuing to lease the parklands in issue to the Boy Scouts. (Compl. at 21). If the ultimate disposition of this case is in Plaintiffs' favor, and the Court grants the requested declaratory and injunctive relief, that injury would be redressed because the leases would be terminated and the City would be enjoined from again leasing the Balboa Park and Fiesta Island properties to the Boy Scouts. Plaintiffs Barnes-Wallace and Breen therefore having standing to bring their First through Fourth Causes of Action, and Defendant's summary judgment motion with respect to these claims is DENIED.

II. Plaintiffs Barnes-Wallace Lack Standing to Sue for Violation of the City of San Diego's Human Dignity Ordinance

The City of San Diego's Human Dignity Ordinance declares that it is the "public policy of the City of San Diego that it is necessary to protect and safeguard the right and opportunity of all persons to be free from discrimination based on sexual orientation." *See* San Diego City, Ca, Code Div. 96 § 52.9601. To carry out that public policy, the Ordinance makes it unlawful to deny persons equal enjoyment of city facilities, impose different terms or conditions on the use of City services, programs or facilities on the basis (in whole or in part) of the persons' sexual orientation. *See id.* § 52.9606(A) (1)-(3). This claim is therefore brought only by Plaintiffs Barnes-Wallace, who challenge the leases as enabling discrimination against them on the basis of their sexual orientation.

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The Ordinance provides that “[a]ny aggrieved person may enforce the provisions of this Division by means of a civil action,” *id.* § 52.9609(a), and that “[a]n action for injunction under this section may be brought by any aggrieved person[.]” *Id.* § 52.0609(b)(2). Defendants’ contend that the term “aggrieved person” limits standing to those persons who can show direct causal injury and therefore requires that Plaintiffs Barnes-Wallace show that they themselves have been or will imminently be denied access to the facilities or programs because of their sexual orientation. As the Court explained above, *infra* section I(A)(1), Plaintiffs Barnes-Wallace have not attempted to use or been denied use of the properties in question. Consistent with that finding, the Court determines that Plaintiffs have not suffered a direct, actual injury and therefore do not have standing to sue under the City’s Human Dignity Ordinance. Defendants’ summary judgment motion is **GRANTED** with respect to Plaintiff’s Fifth Cause of Action.

III. Plaintiffs Lack Standing to Sue for Breach of Contract

Plaintiffs claim that the Boy Scouts have breached the lease by discriminating on the basis of sexual orientation and nonbelief in violation of the leases’ nondiscrimination clauses. All of the parties agree that to have standing to sue for breach of contract, Plaintiffs must show that they are third-party beneficiaries of the leases in question. See Cal. Civ. Code § 1559. Section 1559 of the California Civil Code provides that “[a]

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contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Persons "only incidentally or remotely benefited" by a contract do not have standing to sue for breach. *Martinez v. Socoma Cos.*, 11 Cal. 3d 394, 400 (1974).

Plaintiffs claim that they have standing to sue as creditor beneficiaries of the contract. The parties cite to *Martinez v. Socoma Cos.*, 11 Cal. 3d 394, 400 (1974), as the relevant caselaw. In *Martinez*, the plaintiffs were East Los Angeles residents who qualified for employment under contracts between the United States Department of Labor and private industry manufacturers. Under the terms of the contracts, the federal government provided funds for employment of the "hard-core unemployed." *Id.* at 398. The manufacturers failed to perform under the contracts and wrongfully terminated the employees. *Id.* at 399. The employees claimed they were entitled to damages for the manufacturers' nonperformance of the contracts. The California Supreme Court held that as incidental beneficiaries of the contract, the employees lacked standing to bring the suit. "A person cannot be a creditor beneficiary unless the promisor's performance of the contract will discharge some form of legal duty owed to the beneficiary by the promisee." *Id.* at 400. The employees were only incidental beneficiaries because the government did not have any legal duty to provide the benefits provided in the contracts. *Id.*

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Plaintiffs claim that the City of San Diego does owe them a legal duty under the terms of the leases. Namely, Plaintiffs claim that the City has a duty to assure that their access to public parkland is unencumbered by discriminatory restrictions. "Whether a putative third party is an intended beneficiary of the contract depends on whether such intent appears from the written terms of the contract." *Mission Oaks Ranch, Ltd. v. County of Santa Barbara et al.*, 65 Cal. App. 4th 713, 724 (1998)(disapproved on other grounds) (citing *Garcia v. Truck Ins. Exchange*, 36 Cal.3d 426, 436 (1984)). It is undisputed that neither of the leases in question explicitly designate Plaintiffs Barnes-Wallace and Breen as intended beneficiaries. It is also undisputed that the properties are held in trust for the benefit of the public, and that Plaintiffs are members of that public. However, no court has held that being a member of the public in whose trust the land is held gives an individual the right to bring a private citizen lawsuit for breach of contract as a third party beneficiary.

Plaintiffs rely on the principle of law that "land which has been dedicated as a public park must be used in conformity with the terms of the dedication, and it is without the power of a municipality to divert or withdraw the land from use for park purposes." *Slavich v. Hamilton*, 201 Cal. 299, 302 (1927). As is discussed below, *supra* section IV, that principle supports Plaintiffs' claim for violation of the public trust, but it does not support Plaintiffs contention that they are third party beneficiaries to the leases. *Mulvey v. Wangenheim*, 23 Cal.App. 268, 271 (1913) ("[W]e are of

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the opinion that the acts complained of constitute a diversion of a portion of the park property from the uses to which it has been dedicated, and will be in violation of the trusts upon which said property is held by the city.”). The Court therefore concludes that Plaintiffs are incidental beneficiaries to the challenged leases and without standing to bring a claim for breach of contract. Defendants’ summary judgment with respect to the Sixth Cause of Action is therefore **GRANTED**.

IV. The Fourth Cause of Action States a Claim Upon which Relief May be Granted

Defendants argue that Plaintiffs’ Fourth Cause of Action fails to state a claim upon which relief may be granted. The Court, in its evaluation of a motion to dismiss, must (1) construe the complaint in the light most favorable to the plaintiff, (2) accept all well-pled factual allegations as true, and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996). Following a consideration of this established rule, dismissal is proper only where there is either a “lack of cognizable legal theory” or “the absence of sufficient facts alleged under a cognizable legal theory.” *See Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

However, motions to dismiss are quite rare and are viewed disfavorably due to the liberal construction policy regarding amendments. *See Gilligan v. Jamco Develop. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (“The motion to

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dismiss for failure to state a claim is viewed with disfavor and is rarely granted.") (internal quote omitted); *United States v. Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981) (holding that a 12(b)(6) dismissal is proper only in "extraordinary" cases). Thus, if the Court dismisses a complaint for failure to state a claim, it should allow leave to amend "unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." See *Schreiber Distributing Co. v. Serv-Well Furniture, Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

Plaintiffs' Fourth Cause of Action is for "Violation of Duty to Maintain Public Parks for the Benefit of the General Public." (Complaint ¶¶ 88-89). "[L]and which has been dedicated as a public park must be used in conformity with the terms of the dedication, and it is without the power of a municipality to divert or withdraw the land from use for park purposes." *Slavich v. Hamilton*, 201 Cal. 299, 302 (1927). Where a municipality diverts "a portion of the park property from the uses to which it has been dedicated," it acts "in violation of the trusts upon which said property is held by the city." *Mulvey v. Wangenheim*, 23 Cal.App. 268, 271 (1913).

In support of their Fourth Cause of Action, Plaintiffs allege that the leases put the parkland to improper use for two separate reasons: (1) the City permits the parklands "to be leased, occupied, and controlled by defendant BSA-DPC, which discriminates based on sexual orientation and religious non-belief in the provision of access to and use of leased public parklands"

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and (2) the BSA-DPC "has constructed various facilities and improvements upon the parkland for its own exclusive or predominant use." (Compl. ¶ 89).

Defendant Boy Scouts argues that Plaintiffs have failed to state a claim with respect to the first theory because "Boy Scouts membership policies do not dictate use of the Balboa Park campground or the SDYAC. No one is denied access to either one on the basis of religion or sexual orientation." (P&A at 18). They then argue that Plaintiffs fail to state a claim with respect to the second theory because (1) its use of the Fiesta Island land is consistent with the terms of the lease and is not exclusive; and (2) its use of the Balboa Park facility is consistent with park purposes and the only improvements not for use by the public are Council offices, which "occupy only a small portion of the leased property" and "are used in part to perform administrative work that is essential to the operation of the Balboa Park campground (as well as the SDYAC)" consistent with City policy. (P&A at 18-19).

The Boy Scouts arguments would be appropriately presented in a summary judgment motion and raise issues that cannot be addressed in a motion to dismiss. Taking the allegations as true, the Court concludes that Plaintiffs have stated a claim for violation of the public trusts in question, and Defendants' motion to dismiss Count Four is DENIED.¹⁶

16. The Court does not conclude that the Plaintiffs' complaint alleges nothing more than that the City cannot lease
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*Appendix G***V. Federal Rule of Civil Procedure 56(f)**

Plaintiffs raise the issue of whether they should be allowed to pursue further discovery in support of their opposition under FED. R. CIV. P. 56(f), which provides

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

In sum, Rule 56 (f) allows the court to deny or continue a motion for summary judgment when the party opposing the motion demonstrates a need for further discovery to obtain facts essential to its opposition. *See Celotex*, 477 U.S. at 326. The purpose of the rule is to prevent an opposing party from being railroaded by a premature motion for summary judgment. *Id.* A party seeking a continuance must "make clear what information is sought and how it would preclude summary judgment." *Margolis v. Ryan*, 140 F.3d 850, 853 (9th Cir. 1998); *Maljack Productions, Inc. v.*

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parkland to the Boy Scouts because of their membership policies, and therefore does not reach Defendants' argument that termination of the leases would amount to viewpoint discrimination in violation of the First Amendment.

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GoodTimes Video Corp., 81 F.3d 881, 888 (9th Cir. 1996). The moving party, therefore, “may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts.” *Simmons Oil Corp. v. Tesoro Petroleum Corp.*, 86 F.3d 1138, 1144 (Fed. Cir. 1996) (quoting *Securities & Exchange Common v. Spence & Green Chem. Co.*, 612 F.2d 896, 901 (5th Cir. 1980)). Specifically, a party seeking to continue a motion for summary judgment must (1) set forth in affidavit form the specific facts that it hopes to elicit from further discovery, (2) show that those facts exist, and (3) explain why those facts are essential to resisting the motion for summary judgment. *State of California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998), cert. denied, 119 S. Ct. 64 (1998). The Court has granted Defendants’ summary judgment motions only on Counts Five and Six. Plaintiff has not explained, nor can the Court image, how additional discovery would better enable Plaintiffs to oppose summary judgment on those two counts, which are dismissed on the basis of legal, and not factual, issues. Plaintiffs’ Rule 56(f) motion is therefore DENIED.

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CONCLUSION

It is hereby **ORDERED** that:

- (1) Defendants' motion for summary judgment is **GRANTED** with respect to Plaintiffs' Fifth and Sixth Causes of Action;
- (2) Defendants' motion for summary judgment is **DENIED** with respect to Plaintiffs' First, Second, Third and Fourth Causes of Action;
- (3) Plaintiffs' Rule 56(f) motion is **DENIED**; and
- (4) Defendants' motion to dismiss Plaintiffs' Fourth Cause of Action is **DENIED**.

IT IS SO ORDERED.

DATED: April 12, 2001

s/ Napoleon A. Jones, Jr.
NAPOLEON A. JONES, JR.
United States District Judge

cc: All Parties